

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 550

WALTER A. LAVENDER, ADMINISTRATOR DE
BONIS NON OF THE ESTATE OF L. E. HANEY,
DECEASED, PETITIONER,

vs.

J. M. KURN, ET AL., TRUSTEES OF ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, DEBTOR, AND
ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSOURI

INDEX

	Original	Print
Proceedings in Supreme Court of Missouri.....	a	a
Caption	a	a
Judgment of Circuit Court of City of St. Louis.....	b	b
Order allowing appeal by Illinois Central Railroad Co. to Su- preme Court of Missouri	c	c
Order allowing appeal by Trustees to Supreme Court of Mis- souri	e	e
Order assigning cause	f	f
Appellants' joint abstract of record from Circuit Court of City of St. Louis.....	1	1
Third amended petition	2	2
Separate demurrer of defendants J. M. Kurn and John G. Lonsdale, trustees of St. Louis-San Francisco Rail- way Company, debtors	6	5
Demurrer of defendant Illinois Central Railroad Com- pany	7	6

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Appellants' joint abstract of record from Circuit Court of
City of St. Louis—Continued

	Original	Print
Separate answer of defendants J. M. Kurn and Frank A. Thompson, trustees of St. Louis-San Francisco Rail- way Company, debtor, to third amended petition.....	78	6
Answer of defendant Illinois Central Railroad Company to third amended petition	8	7
Trial	9	7
Verdict	9	7
Defendants' motions for new trial filed	9	7
Defendants' motions for new trial overruled.....	9	7
Appeals allowed	9	8
Bill of exceptions filed	10	8
Defendants' joint bill of exceptions.....	11	9
Caption and appearances.....	11	9
Plaintiff's evidence	12	9
Plaintiff's Exhibit 1—Letters of administra- tion issued to Evelyn Burke	12	10
Plaintiff's Exhibit 2—Letters of administration issued to Walter A. Lavender	13	10
Plaintiff's Exhibit 5—Letter from C. H. Skinker, Jr., to N. Murry Edwards.....	18	15
Plaintiff's Exhibit 4—Part of contract between Illinois Central Railroad Company and the trustees of St. Louis-San Francisco Railway Company	20	16
E. L. Gates (deposition)—		
Direct examination	24	20
Cross-examination	28	23
Redirect examination	29	24
Recross-examination	30	25
Walter Ora Bundy (deposition)—		
Direct examination	31	26
Cross-examination	34	29
Sam Edwin Arnold (deposition)—		
Direct examination	35	29
Cross-examination	37	31
Denman M. Stubbs (deposition)—		
Direct examination	37	31
Cross-examination	40	33
Redirect examination	41	34
John Joseph Drashman—		
Direct examination	41	34
Cross-examination	66, 75	57, 64
Redirect examination	69, 75	59, 64
John Joseph Drashman (deposition)—		
Direct examination	71	60
Cross-examination	74	63
Redirect examination	75	64

Appellants' joint abstract of record from Circuit Court of
City of St. Louis—Continued

Defendants' joint bill of exceptions—Continued

Plaintiff's evidence—Continued

Original Print

W. E. Turner, Jr. (deposition)—

Direct examination	76	65
Cross examination	78	66

Plaintiff's Exhibit 3—Hospital record.....	78	66
--	----	----

Russell Kaurez (deposition)—

Direct examination	79	67
--------------------------	----	----

Joseph Feldman—

Direct examination	80	68
--------------------------	----	----

Julia Haney—

Direct examination	80	68
Cross examination	90	78

Robert J. O'Brien—

Direct examination	92	79
--------------------------	----	----

Alvin Arthur Haney—

Direct examination	92	79
Cross examination	95	81
Redirect examination	95	82

C. Bruce Farmer—

Direct examination	96	82
Cross examination	98, 100	84, 85
Redirect examination	100	85
Recross examination	100, 101	85, 87

Marjorie Haney Linsom—

Direct examination	101	87
Cross examination	102	88

Plaintiff's Exhibit 4a—Map attached to contract	102a	88
---	------	----

Plaintiff's Exhibit 5—Letter from C. H. Skinker, Jr., to N. Murry Edwards	103	89
--	-----	----

Plaintiff's Exhibit 6—Check to L. E. Haney, De- cember 30, 1939.....	105	90
---	-----	----

Defendants' motions for directed verdict and orders refusing same.....	107	91
---	-----	----

Defendants' evidence	108	92
----------------------------	-----	----

Claude Joseph Bruno—

Direct examination	108	92
Cross examination	113, 121	95, 103
Recross examination	120	101

Recalled—

Direct examination	152	131
Cross examination	153	132

Appellants' joint abstract of record from Circuit Court of City of St. Louis—Continued		
Defendants' joint bill of exceptions—Continued		
Defendants' evidence—Continued		
Defendant Illinois Central Railroad Company's Exhibit 1—Pass issued to C. J. Brusco and wife	119	100
Defendants' Exhibits "A", "B", "C" and "D"—Photographs	120a	102
Ora L. Young—		
Direct examination	121	103
Cross-examination	130	112
Trustees' Exhibit "F"—Letter from F. H. Schaffer to W. Atwell, dated April 18, 1936.....	127	108
Defendant Illinois Central Railroad Company's Exhibit 2—Photograph of button	128a	116
Donald Willard Scott—		
Direct examination	137	118
Cross-examination.....	138	118
Redirect examination	139	119
Further cross-examination	139	119
G. W. Creagh—		
Direct examination	139	119
Cross-examination	142	122
Redirect examination	142	122
J. E. Mee—		
Direct examination	145	125
Cross-examination	147, 148	126, 127
Redirect examination	148	127
John Robert Burns—		
Direct examination	154	132
Cross-examination	156	134
Redirect examination	157	135
Recross-examination	157	135
Plaintiff's evidence in rebuttal	158	136
Alvin A. Haney—		
Recalled—		
Direct examination	158	137
Mrs. Julia B. Haney—		
Recalled—		
Direct examination	159	137
Cross-examination	160	138
Defendants' admissions	161	138
Defendants' motions for directed verdict and orders refusing same	162	139

INDEX

v

Appellants' joint abstract of record from Circuit Court of City of St. Louis—Continued

	Original	Print
Defendants' joint bill of exceptions—Continued		
Plaintiff's instructions given	163	140
Defendants' instructions given	169	145
Instruction given of Court's own motion	170	146
Defendant Illinois Central instruction refused	170	146
Defendants' instruction refused	171	147
Verdict	171	147
Defendants' motion for a new trial	172	147
Defendants' motions for a new trial overruled	176	151
Affidavit for appeal of Illinois Central Railroad	176	151
Affidavit for appeal of Trustees	177	151
Appeals allowed	177	151
Bill of exceptions filed	177	152

Respondent's additional abstract of record from Circuit Court of City of St. Louis

Statement	180	155
Bill of exceptions	190	155
Plaintiff's evidence	190	155
Plaintiff's Exhibit 4—Agreement dated March 27, 1934, by and between Illinois Central Railroad Company and the Trustees of St. Louis-San Francisco Ry. Co.	190	155

E. L. Gates—

Direct examination	204	167
Cross examination	206	169
Redirect examination	207	170

Walter Ora Bundy—

Direct examination	210	173
Cross examination	216	179

Edwin Arnold—

Direct examination	216	179
--------------------	-----	-----

Denman M. Stubbs—

Direct examination	219	182
Cross examination	220	182
Redirect examination	221	184

John Joseph Drashman

Direct examination	223	186
Cross examination	228	211
Second cross examination	233, 239	215, 220
Redirect examination	235, 259	217, 221

John Joseph Drashman (deposition)—

Direct examination	233	224
Cross examination	233	235
Further direct examination	235	237

Respondent's additional abstract of record from Circuit
Court of City of St. Louis—Continued

Bill of exceptions—Continued

Plaintiff's evidence—Continued

W. E. Turner, Jr. (deposition)—

	Original	First
Direct examination	276	279
Cross-examination	281	248
Redirect examination	288	250
Further cross-examination	289	251
Further direct examination	289	251

Plaintiff's Exhibit 3—Hospital record..... 292 253

Joseph Feldmann—

Direct examination	295, 296	255, 257
Cross-examination	296	257

Alvin Arthur Haney—

Direct examination	297	258
Redirect examination	300	261

C. Bruce Farmer—

Direct examination	302	262
Cross-examination	302	262
Redirect examination	304	264

Defendants' evidence

Claude Joseph Bruso—

Cross-examination	305	265
-------------------------	-----	-----

Recalled—

Direct examination	313	273
Cross-examination	313	274

G. W. Creagh—

Cross-examination	305	266
-------------------------	-----	-----

J. E. Mee—

Cross-examination	306	267
-------------------------	-----	-----

John Robert Burns—

Cross-examination	315	275
-------------------------	-----	-----

Plaintiff's evidence in rebuttal..... 317 277

Alvin A. Haney—

Direct examination	317	277
--------------------------	-----	-----

Mrs. Julia B. Haney—

Cross-examination	318	278
Redirect examination	319	279

Minute entry of argument and submission..... 320 280

Judgment

Opinion, Bradley, C. 320 280

Motion for rehearing or to transfer to Court en Banc..... 321 281

Suggestions in support of motion

..... 323 283

..... 326 286

INDEX

vii

	Original	Print
Order overruling motion for rehearing, etc.....	368	323
Motion for leave to file motion to modify opinion.....	369	323
Motion to modify opinion	371	327
Order overruling motion for leave to file motion to modify opinion	379	333
Motion to withhold mandate and stay further proceedings and order sustaining same	376	334
Clerk's certificate.....	371	335
Order extending time within which to file petition for certi- orari	372	336
Order allowing certiorari	373	337

[fol. a] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be It Remembered that, heretofore, to-wit, on the 14th day of June, 1944, there were filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled Walter A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased, respondent, against J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, certified transcripts which included the judgment of the Circuit Court of the City of St. Louis, and the order of said circuit court granting appeals from said judgment to the Supreme Court of Missouri, said transcripts being in words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be It Remembered, that heretofore, to-wit: at the February Term, Nineteen Hundred and Forty-Four of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the third day of March, 1944, it being the twenty-second day of the February Term, 1944, of said Court, the following proceedings were had in cause No. 45112 Series "C" of the causes in said Court, wherein Walter A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased, is plaintiff, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, are defendants, to-wit:

[fol. b]

Friday, March 3rd, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmar Haney, deceased,

vs.

J. M. KURN AND FRANK A. THOMPSON, Trustees of St. Louis
San Francisco Railway Company, debtor, and Illinois
Central Railroad Company, a Corporation

Now at this day this cause again coming on for hearing come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein; thereupon the further trial of this cause is resumed and progresses before the Court and at the close of all the evidence, the defendants present to the Court their separate instructions in the nature of demurrers to the evidence, and the Court having seen and examined the same and being sufficiently advised thereof, doth order that said instructions be refused and filed; thereupon the trial of this cause being terminated and the argument of counsel closed, the same is submitted to the jury, and the jurors aforesaid, upon their oaths as aforesaid, say:

"We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the defendants, and we assess plaintiff's damages in the sum of 30,000 dollars

Canice T. Rice, Foreman."

and the jury being polled, all the jurors say that they concur.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover out of the assets and effects of the Estate of the St. Louis San Francisco Railway Company, now in the hands of J. M. Kurn and Frank A. Thompson, Trustees and from the Illinois Central Railroad Company, a corporation, the sum of Thirty Thousand and no/100 (\$30,000.00) Dollars, together with the costs of this proceeding, for which let execution issue.

[fol. c]

Verdict and Instructions, Filed

And thereafter at the April Term, 1944, of said Court, the following further proceedings were had in said cause, to-wit:

Monday, May 15th, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, deceased,

vs. •

J. M. KURN AND FRANK A. THOMPSON, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a Corporation

Now at this day comes the defendant, Illinois Central Railroad Company, a corporation, by attorney, and upon motion and for good cause shown, the Court doth grant said defendant ninety days additional time within which to file its Bill of Exceptions herein; thereupon, the said defendant files and presents to the Court its affidavit for an appeal and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined the same, doth order that an appeal be and is hereby allowed the Illinois Central Railroad Company, a corporation, to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

Thereupon, come the plaintiff by attorney and defendant, Illinois Central Railroad Company, a corporation, by attorney, and file and present to the Court a stipulation wherein said parties consent and agree that the defendant's appeal bond herein in the sum of \$40,000.00 may be accepted by the Court as such appeal bond, and upon approval thereof, shall act as a supersedeas in said defendant's behalf in this case.

Whereupon, said defendant presents to the Court its appeal bond conditioned according to law in the penal [fol. d] sum of \$40,000.00, with the Manufacturers Casualty Insurance Company, as surety, and the Court having seen and duly considered the same, doth order that said bond be approved and filed, which is now accordingly done.

STATE OF MISSOURI,
City of St. Louis, ss:

I, H. Sam Priest, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same was rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 22nd day of May, 1944.

H. Sam Priest, Clerk, Circuit Court. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

Be It Remembered, that heretofore, to-wit: at the February Term, Nineteen Hundred and Forty-four of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the third day of March, 1944, it being the twenty-second day of the February Term, 1944, of said Court, the following proceedings were had in cause No. 45112 Series, "C" of the causes in said Court, wherein Walter A. Lavender, Administrator de bonis non of the [fol. e] Estate of Lyman Elmar Haney, deceased, is plaintiff, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, are defendants, to-wit:

Friday, March 3rd, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmar Haney, Deceased,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis
San Francisco Railway Company, Debtor, and Illinois
Central Railroad Company, a Corporation

Now at this day this cause again coming on for hearing come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled

herein; thereupon the further trial of this cause is resumed and progresses before the Court and at the close of all the evidence, the defendants present to the Court their separate instructions in the nature of demurrers to the evidence, and the Court having seen and examined the same and being sufficiently advised thereof, doth order that said instructions be refused and filed; thereupon the trial of this cause being terminated and the argument of counsel closed, the same is submitted to the jury, and the jurors aforesaid, upon their oaths as aforesaid, say:

"We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the defendants, and we assess plaintiff's damages in the sum of 30,000 Dollars.

Canice T. Rice, Foreman."

and the jury being polled, all the jurors say that they concur.

[fol. f] Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover out of the assets and effects of the Estate of the St. Louis San Francisco Railway Company, now in the hands of J. M. Kurn and Frank A. Thompson, Trustees and from the Illinois Central Railroad Company, a corporation, the sum of Thirty Thousand and no 100 (\$30,000.00) Dollars, together with the costs of this proceeding, for which let execution issue.

Verdict and Instructions, filed.

And thereafter at the April Term, 1944, of said Court, the following further proceedings were had in said cause, to-wit:

Friday, May 19th, 1944.

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased.

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a Corporation

Now at this day come the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, by attorneys, and file and present to the Court their separate application and affidavit for an appeal and pray an appeal to the Supreme Court of Mis-

souri, and the Court having seen and examined the same, doth order that an appeal be and is hereby allowed the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis San Francisco Railway Company, debtor, to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, H. Sam Priest, Clerk of the Circuit Court, City of St. [fol. g] Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same was rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 25th day of May, 1944.

H. Sam Priest, Clerk, Circuit Court. (Seal.)

And thereafter and on the same day the following proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Admr. d. b. n., Respondent,

vs.

J. M. KURN et al., Trustees, et al., Appellants

Now at this day, it is ordered by the Court that this cause be, and the same is hereby assigned to Division One.

And thereafter and on the 28th day of November, 1944, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Come now the appellants, by attorney, and file their joint abstract of record, with service copy, in the above-entitled cause.

[fol. 1] Which said appellants' joint abstract of the record is in words and figures following, to-wit:

**IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1**

September Term, 1944 (January Call, 1945)

No. 39,172

WALTER A. LAVENDER, Administrator d. b. n. of the Estate
of L. E. Haney, Deceased, (Plaintiff) Respondent,

vs.

J. M. KERN et al., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railroad
Company, (Defendants) Appellants

Appeal from the Circuit Court of the City of St. Louis, Mo.,
Division No. 4, Honorable Joseph J. Ward, Judge

Appellants' Joint Abstract of Record—Filed November 28,
1944

The original petition in the above entitled cause was filed in the office of the Clerk of the Circuit Court of the City of St. Louis on the 15th day of November, 1940.

The suit was originally against the Trustees of St. Louis-San Francisco Railway Company, Debtor, alone.

Summons was duly issued and served upon said defendants and in due time they appeared and filed a pleading in response to said original petition.

Thereafter on the 31st day of March, 1942, an amended petition was filed by plaintiff, and on the 11th day of June, 1942, said defendants filed an answer thereto.

Thereafter on the 22nd day of October, 1942, plaintiff filed a second amended petition, in which he named the defendant, [fol. 2] ant, Illinois Central Railroad Company, as a defendant, in addition to said Trustees. Service of said second amended petition and a summons ordering said Illinois Central Railroad Company to appear at the December, 1942 Term of said Court, was duly had upon said defendant Illinois Central Railroad Company in time for the December Term of Court.

On the 24th day of December, 1942, plaintiff filed a third amended petition, which is as follows (omitting caption and signature):

THIRD AMENDED PETITION

Plaintiff for his cause of action and for the third amended petition filed herein states that he is the duly appointed, qualified and acting administrator de bonis non of the estate of Lyman Elmer Haney, deceased; that plaintiff was on the 29th day of September, 1942, duly appointed administrator d. b. n. of the estate of Lyman Elmer Haney, deceased, by the Probate Court of the City of St. Louis, Missouri, after the letters of administration issued to Evelyn Burke had been at her request revoked by the Court on account of the said Evelyn Burke entering the military service of the United States.

Plaintiff further states that the defendants J. M. Kurn and John G. Lonsdale are and were at all the times herein-after mentioned the duly appointed and acting trustees of the St. Louis-San Francisco Railway Company, a corporation, and as such trustees said defendants at all the times hereinafter mentioned owned, operated and controlled all of the trains, cars, tracks, yards, switches, equipment and other property of the said St. Louis-San Francisco Railway Company, a corporation.

Plaintiff further states that the Illinois Central Railroad Company is and was at all the times hereinafter mentioned a corporation duly organized and existing under and by [fol. 3] virtue of law and at all the times herein referred to said defendant Illinois Central Railroad Company owned, operated and controlled a number of railroads, trains, switch tracks, main lines and other railroad equipment used in the operation of its said railroads.

Plaintiff further states that defendants were at all the times hereinafter mentioned engaged in operating lines of steam railways as common carriers by railroad for hire of passengers, merchandise, livestock and other personal property and freight between the City of Memphis in the State of Tennessee, and points to and beyond the State of Tennessee, and to the states of Alabama, Arkansas and Missouri and other states of the United States; that defendants during all of the times hereinafter mentioned were engaged in running and operating locomotives and freight and pas-

senger trains in the transportation of interstate commerce and interstate freight over their various lines of railroads from points in the States of Missouri and Alabama and other states to points in the State of Tennessee to points and towns and cities in other states.

Plaintiff further states that at the time Lyman Elmer Haney was injured and killed as hereinafter stated, he was in the employ of the defendants, and as such was employed and engaged in working for the defendants as a switch tender, and as such was employed and engaged in working for the defendants as a switch tender in throwing, setting and regulating switches for railroad cars which were being used and which for a long time prior thereto had been used by the defendants in interstate commerce; that at the time plaintiff's intestate, Lyman Elmer Haney, was injured and killed as hereinafter stated he was engaged in interstate commerce, and that both said Lyman Elmer Haney and the defendants at the time Lyman Elmer Haney was injured and killed were engaged in interstate commerce, and that while said Lyman Elmer Haney was in the service of the defendants, and while working within the line of his duty [fol. 4] and within the scope of his employment as a servant of the defendants, he was injured and killed.

Plaintiff further states that on or about the 21st day of December, 1930, while said Lyman Elmer Haney was working in the line of his duties and within the scope of his employment as a servant of the defendants in the defendant's switch yard of the said Grand Central Station at Memphis, Tennessee, he was ordered, directed and required by the defendants to throw or open a switch so that defendants J. M. Kurn and John G. Lonsdale, trustees of the St. Louis-San Francisco Railway Company, debtors, could back an interstate Frisco passenger train into the said Grand Central Station and defendants ordered and required said Lyman Elmer Haney, as said Frisco passenger train was being backed into said station and past said switch, to remain at said switch and after said train had backed over said switch track to immediately close or reline said switch on the track over which said Frisco passenger train had backed into said station; that said Lyman Elmer Haney did in pursuance to his duty and as a servant of defendants on said last mentioned date open said switch and the defendants J. M. Kurn and John G. Lonsdale, trustees, etc., their agents, servants and employes in charge of and operating

said Frisco passenger train, did back said long interstate Frisco passenger train over the track of the switch which said Lyman Elmer Haney had opened, and past Lyman Elmer Haney and that as said Frisco passenger train was backed past where said Lyman Elmer Haney was standing near said switch, the defendants J. M. Kurn and John G. Lonsdale, trustees, etc., negligently caused, suffered and permitted a rod, stick or some other object to project out or swing out from the side of said Frisco passenger train and to strike said Lyman Elmer Haney, knocking him to the [fol. 5] ground and injuring him so severely that he died as a direct result of said injuries so received on the 21st day of December, 1939.

Plaintiff further states that said interstate Frisco passenger train so backed into said Grand Central Station by defendants J. M. Kurn and John G. Lonsdale, trustees, etc., was in the exclusive possession and under the exclusive control of defendants J. M. Kurn and John G. Lonsdale, trustees, etc., and was not under the control or in the possession of said Lyman Elmer Haney.

Plaintiff further states that defendant Illinois Central Railroad Company was guilty of negligence which caused or contributed to cause the injury and death of said Lyman Elmer Haney, in the following respects, to-wit:

1. In negligently failing and refusing to furnish Lyman Elmer Haney with a reasonably safe place in which to work and perform the duties assigned to him and which he was required to do in that the ground was high and uneven near said switch and the light was insufficient and inadequate and the backing train had some object, rod or stick projecting or swinging out to the side near said switch.

2. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with reasonably sufficient lights at the place where he was required to work so that said Lyman Elmer Haney could see and could be seen and thereby be reasonably safe in doing the work required of him to be done by defendants.

3. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with proper and safe equipment to do the work required of him to be done, as alleged

and set out in assignments of negligence numbers 1 and 2 herein.

4. In negligently furnishing and providing a place for said Lyman Elmer Haney to work which was unsafe and [fol. 6] dangerous as described and set out in assignments of negligence numbers 1, 2 and 3 herein.

Plaintiff further states that said Lyman Elmer Haney at all the times herein mentioned was the husband of Julia B. Haney, and lived and resided with the said Julia B. Haney and maintained and supported her, that he also left surviving him on his death two children, Alvin A. Haney, age 25, and Marjorie Haney Linson, age 22; that said Julia B. Haney and said children above mentioned are the only children and heirs at law which said Lyman Elmer Haney left upon his death, and that said Lyman Elmer Haney at the time he was killed as aforesaid was 48 years of age and regularly employed at a salary of \$160.00 per month.

Plaintiff further states that by reason of the death of said Lyman Elmer Haney as a direct and proximate result of the negligence of the defendants, as aforesaid, a cause of action has accrued to this plaintiff for the benefit of said Julia B. Haney, Alvin A. Haney and Marjorie Haney Linson and against the defendants in the sum of Sixty five Thousand and No. 100 Dollars (\$65,000.00), for which sum, together with costs of this suit, plaintiff prays judgment against the defendant.

Thereafter, on the 28th day of December, 1942, the Trustees of said St. Louis-San Francisco Railway Company filed their demurrer to said third amended petition, which (omitting caption and signatures) is as follows:

SEPARATE DEMURRER OF DEFENDANTS J. M. KUHN AND JOHN G. LONSDALE, TRUSTEES OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtors

Come now defendants J. M. Kuhn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company, debtor, separate and apart from their co-defendant herein, [fol. 7] and demur to plaintiff's third amended petition filed herein upon the grounds and for the reasons following:

1. Because said third amended petition fails to state facts sufficient to constitute a cause of action against these defendants.

2. Because it appears upon the face of said third amended petition that plaintiff is not a proper party and does not have legal capacity to institute and prosecute this suit.

3. Because it appears upon the face of said third amended petition that there is a defect of parties defendant.

Thereafter, on the 4th day of January, 1943, the defendant Illinois Central Railroad Company, by leave of court, filed its demurrer to said third amended petition which (omitting caption and signatures) is as follows:

DEMURRER OF DEFENDANT ILLINOIS CENTRAL RAILROAD COMPANY

Comes now the defendant Illinois Central Railroad Company, appearing for itself alone, and demurs to plaintiff's third amended petition filed herein, for the reason following, to-wit:

Because said third amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Thereafter, on the 8th day of February, 1943, at the February Term of said court, the said demurrer of said Trustees was overruled by order duly entered of record in said cause. [fol. 8] Thereafter, on the 12th day of February, 1943, the said Trustees filed their answer to said third amended petition, which answer, omitting caption and signatures, is as follows:

SEPARATE ANSWER OF DEFENDANTS, J. M. KURN AND FRANK A. THOMPSON, TRUSTEES OF ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, DEBTOR, TO THIRD AMENDED PETITION

Comes now defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, separate and apart from their co-defendant herein, and for their answer to plaintiff's third amended petition filed herein deny all and singular each and every allegation in said third amended petition contained.

Wherefore, having fully answered, these defendants pray to be hence discharged with their costs herein expended.

Thereafter, on the 30th day of April, 1943, the separate demurrer of defendant Illinois Central Railroad Company, was overruled, by order of court entered in said cause.

Thereafter on the 13th day of May, 1943, said defendant, Illinois Central Railroad Company, filed its answer to said third amended petition, which answer, omitting caption and signatures, is as follows:

ANSWER TO THIRD AMENDED PETITION

Comes now defendant, Illinois Central Railroad Company, appearing for itself alone, and for answer to the third amended petition filed by plaintiff herein, denies each and every allegation therein contained.

Wherefore, having fully answered said third amended petition, this defendant prays to be hence dismissed with its costs.

[fol. 9]

VERDICT

Thereafter, on the 28th day of February, 1944, it being one of the days of the February, 1944, Term of said court, said cause was regularly assigned to Division No. 9 of said court, and the trial of said cause was begun before Honorable Joseph J. Ward, Judge of said court, and a jury, and not being completed on said day said trial progressed on February 29, March 1, March 2 and March 3, 1944, on which last mentioned date and at said February Term of court, said trial was concluded and resulted in a verdict in favor of plaintiff and against all of the defendants for the sum of \$30,000.00, and judgment was duly entered on said verdict.

MOTIONS FOR NEW TRIAL

Thereafter, on the 7th day of March, 1944, it being one of the days of the February, 1944, Term of said court, defendant Illinois Central Railroad Company filed its motion for a new trial of said cause, and on said day and at said term of court the defendants, the trustees of St. Louis-San Francisco Railway Company, filed their motion for a new trial of said cause.

—ORDER OVERRULING MOTIONS FOR NEW TRIAL

Thereafter, on the 24th day of April, 1944, it being one of the days of the April, 1944, Term of said court, the court, by order duly entered of record in said cause, overruled both of said motions for a new trial of said cause.

ORDERS ALLOWING APPEALS

Thereafter, on the 15th day of May, 1944, it being one of the days of the April, 1944, Term of said court, the court allowed defendant Illinois Central Railroad Company ninety days to file its bill of exceptions, fixed its appeal bond in the sum of \$40,000.00, and the said defendant having filed its application on said day, duly supported by affidavit, praying an appeal of said cause to the Supreme Court of Missouri, said defendant was duly granted an appeal of said cause to said court, the docket fee of \$10.00 [fol. 10] for the Supreme Court having been on said day paid to the clerk of the circuit court. In due time said appeal bond was filed and approved, pursuant to stipulation filed.

Thereafter, on the 19th day of May, 1944, it being one of the days of the April, 1944, Term of said court, the court allowed defendants, the Trustees of St. Louis-San Francisco Railway Company, ninety days to file their bill of exceptions, and the said defendants having filed their application on said day, duly supported by affidavit, praying appeal of said cause to the Supreme Court of Missouri, said defendants were duly granted an appeal of said cause to said court, the docket fee of \$10.00 for the Supreme Court having been on said day paid to the clerk of the circuit court.

BILL OF EXCEPTIONS FILED

Thereafter, within the time allowed by law and on the 27th day of November, 1944, it being one of the days of the September, 1944, Term of said court, the defendants presented in open court their joint bill of exceptions in said cause, the same having already been signed by Honorable Joseph J. Ward, who was the Judge presiding at the trial of said cause, and the same was thereupon approved, allowed, signed by the Judge presiding in said division at the time of the filing of the same, and was by order of court duly entered in said cause, filed and made a part of the record in said cause.

Said bill of exceptions is here set forth in abstract. It is as follows:

[fol. 11] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
STATE OF MISSOURI

No. 45,112, Div. No. 9

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of Lyman Elmer Hagey, Deceased, Plaintiff,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of the St.
Louis-San Francisco Railway Company, Debtor, and Illi-
nois Central Railroad Company, a Corporation, Defend-
ants

Defendants' Joint Bill of Exceptions

Be It Remembered, That at the February Term of the
said Circuit Court of the City of St. Louis, State of Mis-
souri; and on the 28th day of February, 1944, the above
styled cause came on to be tried and was tried before the
Hon. Joseph J. Ward, Judge of the Circuit Court of the
City of St. Louis, State of Missouri, presiding in Division
No. 9 thereof, and a jury; the parties appearing by their
respective attorneys as follows:

APPEARANCES:

N. Murray Edwards, Esq., and Martin P. Hart, Esq., for
the plaintiff.

A. P. Stewart, Esq., and C. H. Skinker, Jr., Esq., for the
defendants J. M. Kurn and Frank A. Thompson, Trus-
tees of St. Louis-San Francisco Railway Company,
Debtor.

William R. Gentry, Esq., for the defendant Illinois Cen-
tral Railroad Company.

[fol. 12]

Plaintiff's Evidence

Thereupon the plaintiff, to sustain the issues in his be-
half, offered and introduced the following evidence, to wit:

Plaintiff's counsel handed to the reporter two documents
marked, respectively, Plaintiff's Exhibits 1 and 2, and stated
that he desired to offer them in evidence.

By Mr. Gentry: I understand that plaintiff is ready to
make the first offer.

By Mr. Edwards: That's right.

By Mr. Gentry: At this time the defendant, Illinois Central Railroad Company, objects to the introduction of any evidence in the case as against Illinois Central Railroad Company for the reason plaintiff's third amended petition does not state facts sufficient to constitute a cause of action against that defendant.

By Mr. Skinker: Defendant, Frisco Trustees, object to the introduction of any evidence for the reason that plaintiff's third amended petition upon which the case is being tried, fails to state facts sufficient to constitute a cause of action against said defendant, Frisco Trustees.

By the Court: Objections overruled.

To which ruling of the Court the defendants and each of them, then and there duly excepted and still continue to except.

PLAINTIFF'S EXHIBIT 1

Plaintiff thereupon offered in evidence his Exhibit 1, being the letters of administration on the estate of Lyman Elmer Haney, deceased, issued by the Probate Court of the City of St. Louis, Mo., on November 15, 1940, appointing Evelyn Burke as administratrix of the estate of Lyman Elmer Haney, deceased.

(It is unnecessary to set out said exhibit, as it was a certified copy of letters of administration in the usual form provided for by the Missouri Statutes.)

[fol. 13]

PLAINTIFF'S EXHIBIT 2

By Mr. Edwards: I next want to offer in evidence Plaintiff's Exhibit 2, which is letters of administration showing the revocation of the letters to Evelyn Burke, at her request, and the appointment of Walter A. Lavender, as administrator de bonis non of the estate of Lyman Elmer Haney, deceased, and who is the plaintiff at this time.

(What was said of Exhibit 1 is true of Exhibit 2, and, therefore, it is unnecessary to set it out.)

By Mr. Edwards: Mr. Skinker, may I have the admission—I understand, Mr. Skinker, it will be admitted by you and your client, and Mr. Gentry and his client, that Frisco passenger train 106, which arrived at the Grand Central

Station in Memphis, Tennessee, on the evening of December 21, 1939, commenced its run at Birmingham, Alabama, and was an interstate train.

By Mr. Skinker: That's right, as far as we are concerned, he may read the entire letter which constitutes the agreement we made, with certain exceptions.

By Mr. Gentry: I don't agree to all those things, but I admit that was an interstate train.

By Mr. Edwards: I have noted those you told me about.

By Mr. Skinker: You can read it all as to me, and let him object to whatever he desires.

By Mr. Edwards: This is admission that the defendants are making in this case to obviate the necessity of making proof of this fact. I just read one. Number two—I have just read the admission it was an interstate commerce passenger train, No. 106. Number two are photostatic copies of the hospital records at St. Joseph's Hospital, Memphis, Tennessee, December 21, 1939, in connection with the death of Lyman Haney, is a correct copy of the original of said hospital records, kept in the regular course of hospital business and may be used in the trial of the above case for all purposes for which such records might be used.

By Mr. Gentry: I make that admission.

[fol. 14] By Mr. Skinker: I make everything that is in the record referred to.

By Mr. Edwards: Number three, this is not admitted by Mr. Gentry.

By Mr. Gentry: That is correct.

By Mr. Edwards: But it is admitted by Mr. Skinker for the Frisco Railroad Company as being true. This one I will read to you: "3. That on and prior to December 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof, known as the Y. & M. V. Railroad Company, as a switch tender in the railroad yards at the Grand Central Station at Memphis, Tennessee; that his duties included the throwing of switches for said railroad and also the Frisco and other railroads using the Grand Central Station, and that for his said services, the Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse the railroad company for 2/12 of said Haney's wages." That is admitted by the Frisco Railroad Company, but is not admitted by the Illinois Central Railroad Company?

By Mr. Gentry: That is correct; the statement is not admitted by us.

By Mr. Edwards: Correct. Now, gentlemen, I will read to you another admission that is made by the Frisco Railroad Company, by Mr. Skinker, only part of it is made by Mr. Gentry—I will show you that later: "4. That a written contract dated the 27th day of March, 1934, by and between the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railroad Company, debtor, with print thereto attached, marked Exhibit A, together with letters dated May 23, 1934, from W. Atwill, Vice-President and General Manager of the Illinois Central Railroad Company to H. L. Woerman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Missouri, and letter dated May 28, 1934, [fol. 15] from H. L. Woerman, Chief Operating Officer for Frisco Trustees, to W. Atwill, V. P. & G. M., Illinois Central System, Chicago, Illinois, were in full force and effect on December 21, 1939, and have been since the dates thereof, and plaintiff's photostatic copies thereof are true and correct copies of the original document in the office of the secretary for the Trustees of the said Frisco Railroad Company. Said Trustees, however, deny that the document referred to in this paragraph applies to the employment of said Lyman Haney, and deny that said document applies to or includes the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries." That is admitted by the Frisco Railroad Company, but not by Mr. Gentry.

By Mr. Gentry: It is all admitted by me with the exception of two or three words there.

By Mr. Edwards: That's right.

By Mr. Gentry: The words which I do not admit are these: "or portion of said railroad yards." If that is eliminated I will admit the entire paragraph.

By Mr. Edwards: You admit paragraph 4 with the exception of what you have stated.

By Mr. Gentry: That is correct.

By Mr. Gentry: That letter you read was Exhibit 4?

By Mr. Edwards: It is marked in the letter from Mr. Skinker to me as 4, but is Exhibit 3, Plaintiff's Exhibit 3.

By Mr. Gentry: I thought the photostatic copy of the hospital records was Plaintiff's Exhibit 3.

By Mr. Edwards: That's right; we will mark the hospital records Plaintiff's Exhibit 3 and this will be Exhibit 4.

By Mr. Gentry: What about the letter you just read.

By Mr. Edwards: I didn't offer the letter; I just read what he said he would admit. However, let this be marked Plaintiff's Exhibit 4.

[fol. 16] (At this point the hospital record referred to was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 3, G. P. B., 2-28-44.")

(The said letter above referred to was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 4, G. P. B., 2-28-44.")

By Mr. Skinker: We have agreed that the portion of the letter he read be marked Plaintiff's Exhibit 5 and be put in.

By Mr. Edwards: Letter to be marked Plaintiff's Exhibit 5 is the letter Mr. Skinker wrote me about the admission.

(At this point a letter was marked by the reporter, for the purpose of identification, "Plaintiff's Exhibit 5, G. P. B., 2-28-44.")

By Mr. Edwards: Then I will offer in evidence Plaintiff's Exhibit 5, which is letter dated October 3, 1943, addressed to N. Murry Edwards, Attorney, 112 North Fourth Street, St. Louis, Missouri, on the stationery of the St. Louis-San Francisco Railroad Company and signed by C. H. Skinker, attorney for defendants Kurn and Lonsdale. Mr. Lonsdale at that time was one of the Trustees. Since then Mr. Frank A. Thompson has been substituted.

By Mr. Skinker: That's right; Mr. Lonsdale died.

By Mr. Edwards: The admission is the same.

By Mr. Skinker: Yes.

By Mr. Edwards: Plaintiff at this time will offer the contract and the letter spoken of and identified here as Plaintiff's Exhibit 4.

By Mr. Skinker: As to that, this contract of the 27th day of March, 1934, between the Illinois Central Railroad and the Frisco Trustees, the defendants Frisco Trustees object for the reason that that contract does not cover the employment of Mr. Haney, does not cover the place where he [fol. 17] was working, and does not cover his employment, and the admissions here so show, that we are excepting to it, that we are not admitting it covers it. We are admitting it

is an accurate copy of the contract, but we do not admit that it covers this case at all or covers our relations with Mr. Haney or Mr. Haney's job.

By Mr. Edwards: This, together with the map described here as Exhibit A, that I want to offer, is referred to in the contract, shows the location of the yard, the location of the switches, and the testimony will connect that up, and show that Mr. Haney's shanty was right here on this map shown here.

By the Court: You will connect it all up.

By Mr. Edwards: That shows he was working on the very switches shown on this map.

By the Court: You will connect the map and the contract up.

By Mr. Edwards: That's right.

By the Court: Objection overruled.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted, and still continue to except.

By Mr. Edwards: So that we get the record straight, let the map be marked Plaintiff's Exhibit 4-A.

(At this point a map was marked by the reporter, for the purposes of identification, "Plaintiff's Exhibit 4-A. G. P. B., 2-28-44.")

By Mr. Skinner: I might say at this time that at a later stage of the proceedings the Frisco Trustees expect to show definitely that this contract is not applicable, following which we will make our motion to strike it out.

By the Court: We will cross that bridge when we come to it.

By Mr. Skinner: Very well.

By Mr. Edwards: I offer in connection with Plaintiff's [fol. 18] Exhibit 4, a map labeled—described here as Exhibit 4-A, and described in this contract as Exhibit A.

By the Court: Very well.

By Mr. Edwards: Mr. Hart will read this contract, Plaintiff's Exhibit 4, and letter, Plaintiff's Exhibit 5, to the jury.

Mr. Hart thereupon read said letter marked Plaintiff's Exhibit 5, which is as follows (omitting letterhead and caption of case):

PLAINTIFF'S EXHIBIT 5

Mr. N. Murry Edwards, Attorney, 112 N. 4th St., St. Louis, Mo.

DEAR SIR:

In the trial of the above case in the Circuit Court of the City of St. Louis, Mo., it will be admitted by the defendants, J. M. Kurn, and John G. Lonsdale, Trustees of Frisco Company, as follows:

1. That Frisco passenger train No. 106 which arrived at the Grand Central Station at Memphis, Tenn., on the evening of Dec. 21, 1939, commenced its run at Birmingham, Ala., and was an interstate train.

2. That plaintiff's photostatic copy of the hospital record of St. Joseph Hospital, Memphis, Tenn., dated 12-21-39, in connection with the death of Lyman Haney, is a correct copy of the original of said hospital record kept in the regular course of the hospital's business, and may be used in the trial of the above case for all purposes for which said original records might be used.

3. That on and prior to Dec. 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof known as the Y&MV Railroad Co., as a switch tender in the railroad yards near the Grand Central Station at Memphis, Tenn. [fol. 19] That his duties included the throwing of switches for said railroad, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages.

4. That by written agreement dated the 27th day of March, 1934, by and between the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, with print thereof attached marked 'Exhibit A' together with a letter dated May 23, 1934, from W. Atwell, VP&GM, of Illinois Central System to H. L. Worman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Mo., and letter dated May 28, 1934, from H. L.

Worman, Chief Operating Officer for Frisco Trustees, to W. Atwell, VP&GM, Illinois Central System, Chicago, Ill., were in full force and effect on Dec. 21, 1939, and had been since the dates thereof; and that plaintiff's photostatic copies thereof are true and correct copies of the original documents in the office of the Secretary for the Trustees of the Frisco Railroad. Said Trustees, however, deny that the documents referred to in this paragraph apply to the employment of said Lyman Elmer Haney, and deny that said documents apply to or include the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries.

Yours truly, C. H. Skinker, Jr., Attorney for Defendants, Kurn and Lonsdale."

By Mr. Hart: I will read Plaintiff's Exhibit 4, which is the contract referred to. Mr. Hart thereupon read such portions of said contract as were deemed material to the issues.

[fol. 20]

PLAINTIFF'S EXHIBIT 4

So much of the contract, which is very lengthy, has no bearing upon the issues in this case, that instead of encumbering the record with the entire contract, it is briefly summarized as follows, setting forth the portions thereof which are in any wise material to this case:

Said contract is dated May 27, 1934, and is by and between the Illinois Central Railroad Company and the Trustees of St. Louis-San Francisco Railroad Company. The Illinois Central Railroad Company is referred to as the Central Company, and the Trustees of said St. Louis-San Francisco Railway Company, are referred to as the Trustees.

The contract recites the ownership and possession of the station and premises constituting the Terminal by the Central Company.

There are many provisions relating to the use of the Terminal by Frisco trains coming in and out of the City of Memphis, the furnishing of switch engines for them under certain circumstances, the furnishing of necessary tracks and structures by the Central Company, the furnishing of coal and water for engines and water and ice for the passenger trains.

The paragraph designated as 1, found on page 1 of said contract, so far as material to the issues herein, is as follows:

"The Central Company hereby grants to the Trustees the right to use jointly with the Central Company and such other tenants as the Central Company shall have admitted, or may hereafter admit for the use thereof, its aforesaid passenger terminal, consisting of tracks, platforms, that part of its station building devoted to the accommodation of passengers, sales of tickets and checking of baggage, together with concourse and stairways leading to station platforms, joint mail terminal and such other facilities and appurtenances now or hereafter provided by the Central Company for the joint use of its tenant companies in [fol. 21] the conduct and handling of passenger, express and mail business, the lands, premises and buildings embraced within said passenger terminal, being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines in said print, and for convenience all such tracks and facilities shall hereinafter be referred to as 'passenger terminal.'"

Other provisions of the contract deal with furnishing platforms, lockers for use of trustees' employees, furnishing inspection and light repairs under certain circumstances, agreement that employees of Trustees while in and about the passenger terminal shall abide by and conform to rules and regulations of the Central Company, use of a wrecker in case of derailment of trains operated by the Trustees on the terminal and other matters immaterial to the issues herein.

Paragraph 4 of said contract is as follows:

"4. The Trustees agree to pay to the Central Company monthly or within 20 days after receipt of bill the sum of One Dollar and eighty-seven and one-half cents (\$1.87½) for each car in the passenger trains of the Trustees arriving at or departing from said passenger terminal."

Paragraph 8 of the contract, so far as it has any bearing on any of the issues herein, is as follows:

“8. For the purpose of determining liability:

“(a) The Central Company's employees in said passenger terminal while engaged in performing any service for the sole benefit of one of the parties hereto shall be deemed the sole employees of such party.

“(b) The Central Company's employees while engaged in performing or rendering any services solely for the Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the sole employees of the Trustees.”

[fol. 22] By Mr. Edwards: Now there is a map, marked Plaintiff's Exhibit 4-a.

Plaintiff thereupon offered in evidence said Exhibit 4-a, which is a negative of a photostatic copy of the copy of the map attached to a copy of said contract, Exhibit 4, in the office of the Interstate Commerce Commission.

[Note. Said photostatic copy is not set forth at this point, because it is a negative on which the portions of the map attached to the original of said contract which are tinted in red, as referred to in said contract, show white on said Exhibit 4-a; and said exhibit is identical in all other respects with the duplicate original of map attached to the Frisco Trustees' duplicate original of the contract. A photostatic copy of that map is set forth opposite page 102 of this abstract and is in all respects identical with the map attached to the Frisco Trustees' duplicate original of said contract and Plaintiff's Exhibit 4-a, except that on the photostatic copy set forth opposite said page, the portions tinted red in the original show black, because it is impossible to show the red coloring in a photostatic copy.

The Frisco Trustees will, with permission of the Court, lodge with the clerk of this court their duplicate original of said contract with duplicate original of said plat tinted in red as set forth in the contract so that the court may examine the same if desired.]

By Mr. Edwards: This is a map attached to the contract, a map showing the yards down there, and this direction

is west (indicating); that direction is east (indicating); the station in here is north (indicating); and this is Broadway (indicating), as it is labeled; this is labeled Caroline Street (indicating); this is labeled George Street (indicating), and this is Calhoun Avenue (indicating). I just want to show you those directions; no need of taking a lot of time.

[fol. 23] By Mr. Skinker: Defendant Frisco Trustees at this time moves to strike out Plaintiff's Exhibit 4 and 4-A attached which has just been read to the jury, for the reasons stated in our objection, and for the further reason that there has been no showing whatever on the part of plaintiff that that contract of 1934 applies in any way to the employment of Mr. Haney, which is involved in this case, and for the further reason that any provision in that contract with reference to liability between the Illinois Central and the Frisco Trustees are binding only as to them and create no rights in third parties, such as Mr. Haney, or his personal representative.

By Mr. Gentry: The Illinois Central makes the same motion.

By the Court: Motion denied.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

By Mr. Edwards: Now, Mr. Hart, will you read this deposition of E. L. Gates first? Read the caption page first to give the jury the date it was taken.

By Mr. Gentry: What is the name of the witness in the deposition?

By Mr. Edwards: Mr. E. L. Gates.

By Mr. Hart: This is in the Circuit Court of the City of St. Louis, the deposition of E. L. Gates—

By Mr. Skinker: What page does that start on?

By Mr. Hart: Page 17. Taken on the 1st day of May, 1941.

By Mr. Gentry: You are offering that in evidence?

By Mr. Edwards: That's right.

By Mr. Gentry: The defendant Illinois Central Railroad objects to the offer of that deposition for the reason that the information that has been given by Mr. Hart, as he read the date, shows it was taken at the time when the [fol. 24] defendant Illinois Central Railroad Company was

not a party to this suit, it had not been made a party to this suit. The record will show it was made a party at a later date. Therefore, the Illinois Central Railroad objects to this deposition, and any evidence in it, as against said Illinois Central Railroad, because Illinois Central Railroad Company was not notified of the taking of it, and had no opportunity to be present—

By Mr. Edwards: We will offer that as against—

By Mr. Gentry: —and was not present.

By Mr. Edwards: We offer that deposition as against defendants J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railroad Company, debtor.

By Mr. Gentry: And not as against the Illinois Central Railroad Company?

By Mr. Edwards: That's right.

By Mr. Hart (reading):

Said deposition taken on the 1st day of May, 1941, in Memphis, Tenn., omitting caption and formal parts, is as follows (in narrative form):

E. L. GATES, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is E. L. Gates. I live in Memphis, Tenn. I am a dispatcher employed by the Arkansas & Memphis Railway Bridge Terminal Company, and have been so employed since February of 1924. I work at the corner of Kentucky Street and Broadway, going on at 3:00 P. M. and off at 11:00 P. M. My duties are to direct the train movements over the bridge between Kentucky Street and Briark, and handling switches.

I knew Lyman Haney during his lifetime, and had known him for several years. He worked about two blocks [fol. 25] east of where I worked. My duties caused me to communicate with him over the phone in regard to train movements. His hours on duty were about the same as mine. Mr. Haney was a switch tender and my duties were somewhat similar to his. It is a combination job that I have; it is to direct the train movements and handle switches.

On the evening of December 21, 1939, I received a report that Mr. Haney had been injured. I do not remember just when I received it, but it was somewhere near seven o'clock or possibly a little later that evening. I don't recall from whom I got the report nor just where I got the information first. It was to the effect that he had been injured there at the switch just east of Florida street. I went to the place where he was said to have been injured. I don't recall whether I went immediately or not, but it was just a few minutes afterwards. I went to the switch where the Frisco train backs into the Grand Central station off the main track at a point possibly 200 feet east of Florida street. Mr. Haney was lying on the ground near that switch, possibly 15 feet from it. It was the Frisco switch leading from the main line to the Grand Central station where the Frisco train usually backs into Grand Central station.

As I recall, Mr. Haney was immediately north of the switch and I would say from 12 to 15 feet due north from the north rail of the Frisco track, lying on his back with his feet toward the track, his feet were nearest the track, as I recall. I found a mound there near the track, north of the Frisco track and switch. Haney's body when I first arrived, was on top of the mound. Someone, I don't know who, was holding his head up. I didn't examine him to see whether there were any injuries or not, or the extent of the injuries, or where he was injured. There were possibly 7 or 8 persons there when I arrived, just a few employees of the railroads. I am not positive just who [fol. 26] was there. I couldn't say for sure who any of them were, it was in the dark and I was there only a minute or two. I didn't see any blood near the body or near the tracks.

I don't know whether Mr. Haney was lying at that time where he was first found, or not. Someone was squatted down and holding Mr. Haney's head up as I came up there. It didn't appear that either of his arms or legs had been run over by the train.

As I recall it, the switch was still lined in the position that it was in as it had been used by the Frisco train backing into the station. In other words, it had not been closed. A part of Mr. Haney's duty was to open that switch and permit that Frisco train to back in and his next duty would have been, after the Frisco train backed in

north to the station, to reline the switch for the main track, that is, to close the switch. There was a switch light on the switch which shows red for the train when lined for the track for the station, and green for the main track.

The Frisco train had an engine and usually about seven cars, I think. They may have had extra equipment at that time, it being just before Christmas. I was not at that scene more than five minutes at the most and then I went back to my duties at my office. I never saw Haney any more. I possibly passed back and forth there the next day to and from Carolina street, as I take that route by there. I did not stop to examine anything in particular. I may have looked the situation over slightly, but did not make an examination.

That mound north of the tracks near the switch was, I would say, about two feet high, that is, above the rail of the Frisco tracks. I would say it was possibly ten or twelve feet from the mound to the north rail of the Frisco tracks. It was just loose dirt that had been thrown out there until it was built up to the height of possibly two feet, and I would say that the base of it came probably [fol. 27] within ten feet of the north rail. That was down at the level of the ground, and then it slopes back a little to the peak of the mound.

I know nothing more about the case other than that Haney was wearing a white cap and it was new or practically new, had not become soiled; and I looked at the cap and at a point on the back of it there was a dirty spot on the outside of the cap. There were no blood stains, but just a black spot, and I was told later that that corresponded with the location of the injury on the back of his head, a little to the right of the center of the head, and a little lower than the crown of the head. Possibly just a little above the top of the ear. The mark on the cap was about the width of my finger and possibly an inch and a half long. It seemed like it just angled down, not across. I showed the cap to someone there, but don't recall who it was. I did not see any weapon of any kind around there. I don't know whether I saw Haney's lantern or not; there were several men there with lanterns. If I saw it I didn't recognize it as being Haney's. I saw no instrument, pipe or club or anything lying around there. There were no light there and none near there.

There has been lights put up since then right near this spot where Haney was killed. It wasn't there at the time when he was killed. It is near the switch and shines on or near it.

There is another track north of that Frisco track, but it is a track of the Rock Island and the south rail of it is about 20 feet north of the Frisco track. There is a switch on that Rock Island track somewhere back in there, but it is between where Haney was injured and the office back there.

When that Frisco passenger train comes in there, I line the switch where I am; the engine heads up on the main track, and Haney lines the switch at the rear end for them to back in. I line a switch west of there for the same train. [fol. 28] On the day in question I don't recall anything out of the ordinary in the backing of the train. I was on the north side of the Frisco train. The engine went on up beyond my place, west of me, just a short distance. If there is extra equipment it goes on farther west. I don't remember whether it went beyond me that time or not. I would say that, in backing in, the Frisco train would not go more than five miles an hour. I do not know whether there were any doors open on that Frisco train as it backed in. You see the train, all of it, doesn't come up as far as I am; I would see very little of it to the rear of the engine.

Cross-examination.

By Mr. Skinker:

That track north of the Frisco track is, I believe, the property of the N. C. & St. L. and leased by the Rock Island. The N. C. & St. L. uses it some. The mound I spoke of was about midway between those two tracks. I conduct my work in a little room which is an office known as the bridge dispatcher's office, at Kentucky and Broadway. It is west of the wye switch that I spoke of, near which Mr. Haney's body was lying when I went down there. I should say it was possibly 800 feet from that switch stand to my office.

It was getting near Christmas time when they usually have extra equipment on the train. If they had such extra equipment on that would cause the engine to go

considerably west of my place. With the ordinary equipment of about seven cars the engine comes up to just about opposite me or a little beyond, and with this extra equipment it would go on beyond me as far as the extra equipment would reach. My office is in a little wooden building. I think it is only about five feet from the north rail of the track. I could hardly stand in there safely between the track and the office when the train was passing. I have no [fol. 29] distinct recollection of just how many cars passed me at that time. If it develops that there were 12 cars on that train I would think about five passed me going west. The train just pulled by me and then backed up.

In speaking of Mr. Haney's cap, I observed the dark spot on the back of it. As well as I can recall, it was about half an inch wide, or maybe a little wider, and about an inch and a half long. It looked like it might have been at a place about the center of the head, a little to the right and a little below the center of the head, but I would say above the ear. I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back.

I have been in that vicinity since the 28th of February, 1928. During that period of time and including the month of December, 1939, I have observed hoboes, tramps and transients on or about those tracks at night attempting to hop freight trains and get rides out of there. There are many tramps, hoboes and transients seeking rides on trains at all times of the day and night. I would say it occurred almost daily. They were everywhere around there. They were both white and colored. The railroads' special agents patrol the tracks and put them off of the properties when found and off of trains. Arrests are often made; the patrol wagon comes down and takes them in and they are prosecuted there.

Redirect examination.

By Mr. Edwards:

After that Frisco train on the occasion in question started to back towards the east and then towards the north into the station, I don't recall that on this specific occasion I stood and watched it for some distance. It

would not have been my custom to watch it beyond the clearing of my switch. I would not customarily watch it [fol. 30] beyond the point where I could reline my switch to its normal position after the engine backed off of it. I presume that after relining the switch I proceeded to the office. I don't know just exactly what I did or what my next movement was. That office or shanty was immediately north of the track about five feet. There is an east window in that shanty. I don't recall looking out of that window and watching the Frisco train backing. I had no occasion to follow the movement of it into the station.

After I went back into my shanty—I could not say immediately or just how long—I attempted to call Mr. Haney on the telephone and I got no response, and a few minutes later I learned he had been struck and injured and I went down to where he was. As I went down there it was dark. There is a street light right there where I work, on that corner, and there are no more street lights between there and Haney's office. I do not think I saw any of the men standing around Haney when I was 50 feet from there, because it was dark.

Recross-examination.

By Mr. Skinker:

The phone Mr. Haney used was in his shanty down where the I. C. main-line tracks and the Frisco tracks cross each other. Unless he happened to be in there I couldn't talk to him anyway. If he would be out around throwing switches or out away from there I couldn't get him if I called him.

By Mr. Edwards (addressing Mr. Hart): You can continue on. This will be offered against the Frisco solely and not against Mr. Gentry's client.

By Mr. Gentry: It is understood that all these depositions were taken before the Illinois Central was made a party to this suit?

Mr. Edwards: That's right.

[fol. 31] By the Court: Objection will be sustained as against Mr. Gentry's client.

By Mr. Edwards: Offered against the Frisco only.

Mr. Mr. Hart (reading):

WALTER ORA BUNDY, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is Walter Ora Bundy. I live in Memphis, Tennessee; I am switchman for the Illinois Central Railroad and have been since February 26, 1926, here in Memphis. On December 21, 1939, my hours at work were from 3 p. m. to 11 p. m. at the depot on a coach engine handling passenger equipment to the coach yard and from the coach yard to the depot. I knew Lyman Haney in his lifetime, by sight, I would say, ten years. I saw him on duty as a switch tender every day in those yards. His duties were ~~not connected or related~~ in any way to mine.

On December 21, 1939, I was in the vicinity of where he was hurt. The accident happened about 7:30 p. m., or something like that. I was on duty in that neighborhood at that time and my foreman was F. L. Russoua. I was in his switching crew helping him. We were coming from the coach yard toward the depot, headed north. I judge we were about 300 or 350 feet from the switch where Haney's body was found. I was east of that switch and the engine was headed north. My next movement would have been to go to the depot. It was necessary to wait until that Frisco train backed in before we went to the depot.

I first learned of Haney's injury from Mr. Claude Bruso who said that Haney was hurt and said he was lying there at the Frisco wye switch. He and I went up there together. No one went with us. When we got to the switch we found Mr. Haney lying on the ground, face down. He was north of the switch and a little to the west of it, probably two or three feet west. His head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle. I would say Haney's head was about six feet from the switch, that is north of it, and a little to the west. His cap was out a little to the right of his head, if I remember right. It was a white cap. I did not examine it carefully and did not notice any marks on it. I did not look

around on the ground to see if there had been any struggle. I didn't see any evidence of it. I did not see any club or pipe or weapon of any kind. I saw a pistol lying under Haney's body. I think Haney was about 5 feet 10 inches in height. I would say his feet were about 10 feet north of the north rail of the Frisco track and extended straight back of him, not doubled under him. We turned him over. Before we turned him over I saw right on the back of his head a gash about two inches long. It was bleeding. I saw no other injury. Mr. Bruso and I were the only ones present when we turned him over. Before we turned him over I did not see his lantern or a pistol. After I turned him over I saw that the pistol and lantern were under his body. The pistol was not in his hand, was just lying there under his body. When we turned him over the pistol came in view. It just appeared there. It indicated it might have slipped out of his pocket, and probably did. I don't know whether the lantern was in his hand or not, it was on the ground, that is all I know. His clothing showed nothing to indicate a struggle.

The Frisco train had just backed east and turned north into the station. I noticed that the switch there by Mr. Haney's body was open. It wasn't lined. Mr. Haney's next duty was to line that switch. It shows red when it is [fol. 33] thrown to back the train around the wye and green when it is lined, as we call it, for the main line. The light is in what we call a lamp that sits on the switch stand. It is a casting of metal and there is a bulb in that cup in there with oil. As I approached I noticed it was red. After that Frisco train backed in, to the best of my knowledge, I would say it was ten minutes before we went up there and found Mr. Haney's body. During that ten minutes I had been waiting for a signal. I was waiting for a signal that Mr. Haney operates over in his shanty. The signal was red and I was waiting for it to change to green. It would have had to be changed by him after he had thrown the switch and gone back to the shanty.

When Bruso came to me on that occasion and reported that Haney had been injured, he said he had found him and he and I went back up there as I have described.

While Bruso and I were there, the first man who came up after us to the scene was Mr. Cowan, I think. He is a switchman who was working on the crew with me. I don't remember whether he came after we had turned Mr.

Haney over, but he did come up in a few minutes after we got there. The two of us didn't remain there very long, not over five minutes, if I remember right. Bruso then went and called the ambulance. We turned Haney around and I raised him up and put his head in my lap, squatted down and put his head in my lap. He was alive but not able to talk. His face was bruised from hitting the ground. I believe the bruise was on the left side of his cheek bone and there were cinders on his face. It appears that the injury to his face was caused by hitting the cinders with his face in falling. I don't suppose it was more than ten or twelve minutes after the ambulance was called until it got there, but I don't know how long it was. I held him in the same position until the ambulance arrived. In turning Haney over, we turned him toward the east, which would be towards his left, and turned him around to the [fol. 34] north and east, turned his head more to the north. There was no one there with Bruso and me when we turned him over and put him in that position. They carried him on a stretcher of some kind from the point where I was holding him out to Florida Street to the ambulance. I noticed he had his watch on. It was a gold watch, was intact and was in the watch pocket in his pants. I did not look for any ring or for his pocket book, and don't know whether he had them or not. When he was taken away, I went back to my crew.

That Frisco train which was backing in from the switch was 12 cars long, I believe. It was longer than usual on account of the Christmas holidays.

I was riding on the front end of my engine, so that when it stopped I was in a position to see that Frisco train backing in, and I could then see that the switch stand where I afterwards found Haney's body was red and I knew it was Haney's switch and his duty to throw the switch. I never had occasion to watch that light because we never come in contact with that switch. I watch the light up over the shanty. That is what we go by. I did not notice that the switch up there by Haney was showing a red light until we went up there.

Cross-examination.

By Mr. Skinker:

There was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern. I did not look at the ground to see whether or not his body had been dragged. From Haney's appearance he appeared to have fallen right forward. It looked to me like some blunt instrument had struck him and caused him to fall forward.

By Mr. Hart: Now, Your Honor, I am reading from the deposition on page 146, as follows:

By Mr. Edwards: This is offered solely against the defendants, Frisco Trustees.

[fol. 35] By Mr. Gentry: It is admitted all of these depositions you are offering were taken before the Illinois Central Railroad Company was made a party to this suit?

By Mr. Edwards: Yes, sir. I think so, including the doctor's examination, I think they were all taken before.

By Mr. Gentry: Then, of course, my objection is on that ground.

By Mr. Edwards: I am limiting it solely to Mr. Skinker's clients. That may be understood as to all of these depositions.

By Mr. Hart: The deposition reads as follows (in narrative form):

SAM EDWIN ARNOLD, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

My name is Sam Edwin Arnold, I live in Memphis, Tenn., am 30 years old, am a switch tender for Illinois Central Railroad Company (often referred to as the I. C. Railroad) and have been a switch tender for 4½ years. In December, 1939, my working hours were from 2:30 p. m. to 10:30 p. m. and I was stationed in Grand Central station. I was working at the south end of the station, at Caroline Street, close to where Lyman Haney was working, but we were not working out of the same shanty. My shanty was farther north from him, one block north. I was putting trains in and out of Grand Central station, handling switches. I have

to go outside of my shanty to handle the switches; there are about 7 or 8 switches to handle. I did not have any lights to work there from the inside of the shanty.

I recall the night when Haney was injured. It was about 7:15 p. m. Mr. Brusco told me. Right after Brusco reported to me about Haney's injury, I went over to the shanty where Haney worked, to throw the board to let the I. C. train in, [fol. 36] but the shanty was locked and I couldn't get in. I then came back over my job and waited until the board went green and let an I. C. train into the Grand Central station.

About 10 or 15 minutes after Brusco had reported to me that Haney had been injured, I went to where Haney was lying. He was laying in Mr. Bundy's arms. When I got there Bundy was holding him up. Bundy was just kind of squatted down on the ground and Haney was laying over on his arm. I just came up and looked down and saw him and turned around and walked down on my job because I was pretty busy at that time of the night. I had to get back on my job. Haney was north of the Frisco switch when I saw him. His body was about 8 feet from the track. I don't remember how he was lying in Bundy's arms. I saw evidence where he had bled on the ground about 8 or 10 feet from the switch. That was close to where Bundy was holding his head, I would say it was a foot or two away, and between Haney's head and the Frisco track. I think Haney's body was about straight north of the Frisco switch. I saw a hole that was knocked in the back part of his head. I didn't see any injury to his face. The only injury I saw was to the back of his head. It looked like he had bled from his head. I would say I remained there about five minutes where Bundy was holding Haney's head, and he was still holding it when I left. The Frisco switch was open at that time and the light was red.

I do duties similar to that of Haney and I knew his duty was to throw this switch and open it so that the Frisco train could back in and his next duty would be to close the switch after the train had backed in. I was south of the shanty where the Frisco train backed in. It was about a 9 or 10 car train consisting of sleeping cars, day coaches, mail cars and baggage cars. It was traveling about 7 or 8 miles an hour, I guess. It stopped on the way because a switch engine had blocked it. I would say that was a

[fol. 37] couple of hundred feet from the switch that Haney had opened. I would say that the back end of the train was about 200 feet north of where Haney had thrown the switch when I gave the signal to stop. The train was standing there 3 or 4 minutes and then I gave a signal for it to go on. I gave the signal to the conductor on the rear of the Frisco train. The I. C. train was interfering so the Frisco couldn't get in until the I. C. got in the clear. That train was going south on the I. C. main line. The Frisco was backing in off of its main line around a wye coming onto the I. C. track.

From my shanty to where Haney's body was found was, I would say, about 300 feet.

I closed the Frisco switch after the ambulance had come down and got Haney. I would say I closed that switch about 30 or 40 minutes after Haney was found. No trains had passed over that switch after Haney was hurt and before I closed the switch.

Cross-examination.

By Mr. Skinker:

I did not make any special effort to count the cars in that Frisco train. I am just making an estimate.

By Mr. Edwards: Now the deposition of D. M. Stubbs, starting on page 211, which we next offer in evidence, solely against the Frisco defendant, Trustees, as follows:

DENMAN M. STUBBS, being duly sworn, deposes and says in behalf of the plaintiff as follows:

My name is D. M. Stubbs. I live in Birmingham, Ala., I am a passenger brakeman on the Frisco and am also described as a rear flagman and have held that position for 35 years. I was acting as rear brakeman or flagman on the passenger train No. 106 from Birmingham, Ala., to Memphis [fol. 38] this, on December 21, 1939. The train was due in Memphis about 6:50 p. m., but did not arrive there until about 7:30 p. m. We had 12 cars in the train, as I remember now, four of them were Pullman cars, three were day coaches and the rest were baggage and mail and express. We had one mail car and I think there were three express cars that

day. We had two extra cars, as I recall it that day, 12 altogether, and of course the engine and tender. The engine was one of our heavy mountain type engines, or, rather, Pacific type, of the 1500 class.

When we arrived at the cross-over before we backed in the station at Memphis, our train stopped at the crossing before we pulled on down, preparatory to backing into the station. I got off just before the train stopped at this regular crossing and proceeded up the I. C. tracks to get into position to flag the train back over these three or four I. C. tracks which back over into the station. I did not know Haney. I had seen him several times but didn't know him personally or know his name. On that occasion it was dark and I couldn't tell who it was, but I saw what I figured was the switch tender's light as he came over from the shanty toward the rear end of the train just below the crossover. I had dropped off some time before that. When I dropped off I intended to go back up and line up these I. C. tracks, to stop anything that might be going over the crossing, to make sure our train had safe passage to go back in there. I have a red and white lantern to stop any other trains which might go over the crossing while we were backing in there. I dropped off practically a train length east of that switch where the Frisco train backs in, which would be practically a thousand feet, I judge. The train went out of my sight and I could not see the rear end of it. I judge it was about 5 or 6 minutes before I swung onto that train again, because I had to stop the train on the crossing. I had to stop my conductor when he started backing down when he got in sight, coming around the curve. I then signed him down and gave him a signal to stop, because there was another train coming over the crossing, blocking us out of the station. My conductor was on the rear end of the Frisco train. He was G. W. Creagh. I judge the rear end of the train was about three car lengths from me when I gave Creagh the signal. It had then started backing into the station.

The last I saw of the man that I took to be Haney, he looked like he was going to get on the rear end of our train and ride on down to the switch which was west of his shanty something like 250 feet. I did not see whether he did that or not and I did not see what became of him. When that train commenced backing into the switch, I was

more than 1000 feet away from it and could not see it or the switch tender at that time. I could not see anything of it; there was this Stratton-Warren building sticking out on the corner, and it obstructs the view until the train backs around about a half a length after it starts. After the rear end got around that building I saw it. That Frisco train was about 150 feet north of the Frisco main line when I could first see it. I could see the rear end when it came around that building, and this engine was coming around the other track and I had to sign my conductor down, give him a signal to stop, which he did. We had to wait there for the other train to get out of the way before we backed in. We must have waited something like two or three minutes or maybe a little more. I guess the rear end of the train was about 150 feet north of the Frisco tracks when it stopped. Then it backed up again and went on into the station. I swung onto it as it went in. I stayed on the ground until it started, and then swung on the rear car. It usually runs an average of 8 or 10 miles an hour.

I think the mail car was coupled onto the tender. There is where it was usually carried.

I heard about Mr. Haney's injury the following morning. [fol. 40] I did not hear about it that evening. I heard he was seriously injured and they thought somebody robbed him, took his purse. Several at the station told me that when I went down to go to work. They asked me if I knew anything about it and I said I did not. Nobody told me they thought something sticking out of the train hit him.

When that train backs into the station it usually stays there about 25 minutes and then goes out. That was the end of my run, so I do not know how long it stayed that night. When it leaves Memphis, it goes on to Kansas City, Mo.

Cross-examination.

By Mr. Skinker:

The Frisco main line tracks at that place run, in a general way, east and west so the train was headed west as it came along there moving forward. In a general way, the Illinois Central tracks there run north and south. In order to get into the station Frisco train 106 had to head

west over the Illinois Central crossing and go far enough west for the back end of it to clear the wye switch and then back into the wye switch and then northeastwardly on toward the station. I dropped off of the Frisco and went up north on the Illinois Central tracks to protect my train as an extra precaution. On this particular evening I stopped an Illinois Central train coming out of there that blocked us. It was a yard engine, if I remember right. There could have been a collision if I hadn't done that. The back end of the Frisco train was pretty well lighted up. I saw the conductor on that platform that night and I joined him when I got on there. He acted on my signal when I signaled him to stop. When I signaled to him to stop, the Frisco engine had already backed beyond the switch stand so that it should have been beyond the switch and should have cleared the switch and no part of the train would have been left on the main line.

[fol. 41] Redirect examination.

By Mr. Edwards:

When I swung onto the train it had just started moving good, something like 8 miles an hour.

JOHN JOSEPH DRASHMAN, being duly sworn, on the part of the plaintiff testified as follows:

Direct examination.

By Mr. Edwards:

My name is John Joseph Drashman. I live in Memphis, Tennessee; am employed by the Frisco Railroad, that is, the Frisco Trustees, the defendants in this case. I have been with the railroad since forty years ago on the 2nd of February. My title is coach foreman. I have charge of the passenger equipment, supervising repairs, anything in connection with the passenger cars. There are two places where I perform my duties; they are the Grand Central Station and the Yale yards, both in Memphis. I go anywhere in the yards where a Frisco train would be stationed. I mean passenger trains. That has been my duty ever since I have been employed there. I have 86 men

working for me. They do coach cleaning, coach repairing, inspecting, and just maintain the passenger equipment. That includes mail cars, for they are considered passenger cars. It has nothing to do with engines and tenders. In December, 1939, I didn't have any specified hours for work. I am on a monthly salary and along that time I was working anywhere from 18 to 20 hours a day. I showed up around the Grand Central Station about 6:30 A. M. and left the station about 8:30 A. M. to go into the Yale yards; then I come back down to the station again around 6 o'clock in the evening. Whenever there is any rush hour in extra work I stay there until it is all completed. Around Christmas time I generally stay there until the last train has departed, which is around 11 o'clock, probably later.

I did not know Lyman Elmer Haney personally.

[fol. 42] On December 21, 1939, while I was on duty, I received a report that Haney had been injured. I was then over around that gate, between tracks 4 and 5, if I remember right.

Plaintiff's Exhibit 4-a, a map, is a correct drawing of the lay of the station and the yards and the switch yards and tracks at Memphis at the Grand Central Station. I have seen maps like that before. I take a pen and make a cross mark on the map where Haney's shanty was located. It was where I have just made that cross. It is north of the Frisco main line that runs east and west. There are several tracks in there; that is what is called the Illinois Central tracks into the depot. The right side of the map is north. The light colored portion in here is the same portion that is red tint in the original map. I don't know anything about these tracks, that is not my job. I couldn't tell you where the switch was from the shanty; I couldn't point it out on the map. The switch, where the body was found, was west of the shanty. I should say it is around 150 feet from the shanty, kind of northwest from it. I do not know who Haney worked for. I had seen him working around there but did not know his name. I didn't pay any attention to how long I saw him around there. I learned of Haney's injury about 7:40 p. m. I should judge I was then about a half a mile from where he was injured. Our superintendent of terminals came through the gate and wanted me to go with him, and that is what I did. I went straight down the track south

from where I was standing. Haney's body had been moved when we got there. I didn't see the body. I remember when my deposition was taken in this case. I remember testifying in my deposition that I went right down there after I heard that there was an accident. I don't remember saying that I was up around the station master's office, but I imagine that is so. I don't remember testifying that I saw [fol. 43] Haney's body there. I don't remember the date of my deposition. I do not remember testifying in my deposition that I didn't know how far Haney's body was from the Frisco tracks, as I didn't measure it.

I did not see the body.

I do not remember testifying that my best judgment would be that it was about six feet from the tracks. I do not remember testifying that I thought the whole body was about six feet from the track. I did not testify to that. The only thing I testified to is as to the location where his body was supposed to have been. I do not remember testifying that he was lying on his face with his back up and his head faced west. I testified Mr. Young, our superintendent of the terminals, and I went down together. That is true. I remember testifying in my deposition that there were several parties there, but I didn't know who they were; that I thought the I. C. switch engine foreman, Brusco, was there and that I thought there were several of the city plain-clothes men there. I remember testifying to that and that is true.

By Mr. Skinker: If the Court please, I don't think the attorney has the right to go ahead with the question and answer all of the way through the deposition. The witness has testified that he has no recollection now of seeing Mr. Haney's body down there, and that he does not recall testifying to that effect. Now, that is all there is to it. There is no occasion to go clear through the deposition.

By Mr. Edwards: But I have a right to plead surprise in this case. This deposition was given by this man, filed like all of the other depositions. I have a right to question this witness on surprise. They have asked me to put him on the stand.

By Mr. Gentry: If the Court please, we did not ask him to put him on the witness stand.

[fol. 44] By Mr. Edwards: You objected to me reading his deposition.

By Mr. Gentry: But don't misquote the statement. We did not ask you to put him on the stand. You have no reason to say that.

By Mr. Edwards: And I am pleading surprise when a man denies his deposition.

By Mr. Skinker: He has not denied his deposition. He says he does not recall seeing the body, and he does not recall testifying about it. Now, that is settled and determined, and that is no reason why he can go clear on through the deposition. I think he could proceed to continue his regular examination of the witness.

By Mr. Edwards: I am going to this particular point, about what happened at the body. When he was testifying today I asked him if he remembered it and he said no. Now, I have a right to refresh his memory.

By the Court: Are you pleading surprise and considering this man as a hostile witness?

By Mr. Edwards: I certainly am. He is still working for the railroad, and I am surprised to have him deny those statements made in the deposition. Some of it he says he remembers, and some he says he does not remember. Now, I am entitled to know what he does remember.

By the Court: Objection overruled.

(To which ruling of the Court, the defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continued to except.)

By Mr. Skinker: Do you propose to go clear through the entire deposition, the entire examination?

By Mr. Edwards: I propose to conduct my case in the best way in an effort to find out what he is going to deny, and what he does say he did, so I can show what this witness now says he knows about it. That is what I propose to do, try my own case in my own way.

[fol. 45] By Mr. Skinker: May I make an objection so that I get it clear?

By the Court: Yes, sir.

By Mr. Skinker: We believe the law to be, and we take the position, when they put this witness on the stand, they have a right to ask him questions as to the facts. And if he says certain facts as he remembers them are a certain way, then they have a right to ask him if he did not testify to the contrary in his deposition, and they have a right

later to read his deposition for impeachment purposes if they want to. But we insist because he does not remember of seeing the man there that they do not have a right to go clear on through the entire deposition question and answer, and ask him if this question was asked and this answer made.

By Mr. Edwards: I am asking him concerning right around Haney's body. It is a funny thing he remembers some things, and does not remember other things. I am entitled to know what he remembers when he made this examination two years ago.

By Mr. Gentry: I submit the proper way is to ask him whatever question he wants to ask. If he wants to develop any evidence from the witness he has a right to ask the witness as to those facts. And when the witness makes an answer, if Mr. Edwards claims it is contrary to what he testified before, then he has a right to read that question and answer from the deposition. We think the orderly way to do is to ask this witness to tell what he remembers about certain facts.

By Mr. Edwards: That is exactly what I am doing.

By Mr. Gentry: No, you are reading from the deposition.

By Mr. Edwards: Now, Your Honor please, we have gone over this a number of times, this witness has shown his hostility, he says he still works for the company, and some things he says that he remembers, and others he does not remember. I am certainly entitled to know the truth.

[fol. 46] By Mr. Gentry: All that is, we are taking time reading from the deposition.

By Mr. Skinker: We renew our objection.

By Mr. Edwards: I will do this, I will try to find out before I go on with this. I want to find out what happened around this body there. I am certain- entitled to that. I might do this.

To Witness:

Q. Mr. Drashman, who have you been talking to about this since this deposition was given?

A. Well, I have not been talking to anyone. I had forgotten about the case altogether. And I am trying to tell you that I do not remember ever stating that I saw the body, which I did not. I did tell you that I saw the location where the body was supposed to have been.

By Mr. Edwards: Well, you have told me that, these questions that I have read to you, that you do not remember, and now you say that you did not hear about this case, or have not talked to anybody about it since the time this deposition was given, until recently?

A. Until the last day or two, yesterday to be exact.

Q. Recently who have you talked to about this case?

A. Well, Mr. Skinker had me in his office yesterday.

Q. Did you go over the case with him yesterday?

A. Not all of the way through, no, sir.

Q. Did you discuss what you were going to testify to here in Court?

A. No, sir; he told me he wanted me to get up and tell the truth just to the best of my recollection, and that is what I am trying to do.

Q. Is that all he told you?

A. Yes, sir.

Q. And that is all you and he talked about?

A. Yes, sir.

I did not testify in my deposition that I saw what looked to me like a hole knocked in the back of Haney's head, like someone had struck him with a blunt instrument of some kind. I did not make any such statement. I do not remember testifying that his head looked like it had a caved-in place as if someone had hit him with a club or [fol. 47] something. I did not say that it could have been a round pipe that hit him, nor that he was not turned over while I was there, nor that I remained there about three minutes. I remember testifying that there was a spot of blood there about six inches across and that is true. I imagine I did say in my deposition that it was south of the rail and I didn't know how close to the switch. I don't remember that part of it. I testified that it was after his body was removed that I saw the blood. I don't remember saying that I did not see any blood while the body was there except on his head. I did testify that Mr. Young and I went there the same night after the body was removed and that Mr. Young and I went down there together. I testified that there was a pile of dirt piled up there which I imagine was about two feet above the rail and extended along there several feet both east and west of the tracks. I did not testify that I came back again after I had been to the scene of the accident. I remember telling you that

I had gone back and inspected the equipment after I left the scene of the accident but I did not tell you that I saw the body. I never did see the body, even up to this time. What they have in this deposition about my seeing the body is not true and I swear I did not so testify. I never did tell you I saw the body at any time.

(At this time a recess was taken until 2 o'clock P. M. on Tuesday, the 29th day of February, 1944, at which time, all being present, the further following proceedings were had in the case at bar, to-wit:)

By the Court: You may proceed, gentlemen.

By Mr. Skinker: Let the record show, Your Honor, that this is in the absence of the jury.

By the Court: Yes, sir; it may so show.

By Mr. Skinker: Plaintiff's attorney, Mr. Edwards, in examining the witness, Drashman, in regard to what said witness stated in his deposition in this case has reached [fol. 48] a point in said deposition approximately at the top of page 199 of said deposition. And the defendants want to read page 199 and approximately the first half of page 200, because they deal with matters which should not be read to the jury. And after reading said portion of the deposition we will then state to Your Honor our objections to the reading of such questions and answers in the presence of the jury. Now, beginning at the top of page 199 of said depositions, being part of the deposition of Witness Drashman, I will read as follows:

"Q. You examined the fireman's side very close?

A. Yes.

Q. And you didn't examine the engineer's side quite so close?

A. Not so close, no.

Q. What was that difference?

A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney?

A. Yes, sir.

Q. That is, someone told you that at the scene of the accident?

A. No, he didn't see the accident; I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

— By Mr. Edwards:

Q. All right, who told you that, and when?

A. I don't know who it was; I just heard them talking around there.

Q. Who did you hear talk and where?

A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground?

A. Yes, sir.

Q. That is where you heard this statement made?

A. Yes, sir.

Q. Somebody said they thought something sticking out [fol. 49] on the train hit him; is that right?

A. That is what I heard there.

Q. That is what you heard there?

Mr. Skinker: Just a moment. I want to object to that as hearsay and improper and may it go to all similar questions?

By Mr. Edwards: Yes.

By Mr. Edwards:

Q. That was down there when you first went down and saw Haney's body?

A. Yes.

Q. You heard someone there where the body was saying that they thought something sticking out on the train hit him; is that right?

A. That is right."

By Mr. Skinker: That is the end of the quote. Now, defendants object to Plaintiff's Counsel repeating the questions and answers which have just been read from the deposition, in the hearing of the jury—that is, we object to them being read in the hearing of the jury, for the reason that they deal absolutely with hearsay, deal with what the witness Drashman is supposed to have heard said by someone down near the scene of the accident; for the further reason that what anyone down near the scene of the accident said, as to what they thought had struck

Mr. Hancy, or injured him, would be a mere conclusion on the part of such person, and would not be competent in evidence, even if such person were present to testify. And this evidence here of what the witness Drashman heard someone down at the scene of the accident, say, as to what he thought caused the accident, is purely hearsay, and is of a highly prejudicial character. And such questions and answers for the reasons stated should not be read to the jury—read in the presence of the jury, and we ask now that the Court rule that said questions and answers may not be read in the presence of the jury, and to rule out such matter as purely hearsay, improper, and incompetent, for the reasons stated.

[fol. 50] By Mr. Gentry: The defendant Illinois Central joins in the objection for all of the reasons stated herein, and I think it would be clearer if Mr. Edwards would say as I now ask him, if it is his intention to read the part of the deposition that has been read by Mr. Skinker, as he is examining this witness. If he has no intention of reading it, we are wasting our time, and if he says he intends to read it, it is the time to rule on it.

By Mr. Edwards: Now, Mr. Gentry, I intend to question this witness as I have been questioning him, and I told Mr. Skinker when I was trying to make the offer, to let me finish my offer—my examination. That is when I was interrupted, when we went to dinner. I want to make my record in a proper way. I have showed that I have been surprised by the testimony of this witness. Under the rule I am required to point out these things to this witness, and see if he said them. If he says he said them, I want to make my record in the proper way. After I have made my record it will probably lead up to these others. And the way the witness has been going, unless he changes his tactics and says he testified as the deposition shows, I then will not have to read them, Your Honor.

By Mr. Skinker: But he has been reading the questions and answers first, and then asking him if he testified to them.

By Mr. Edwards: No, sir; I asked this witness first.

By Mr. Gentry: That is what I have insisted that you should do.

By Mr. Edwards: I took this deposition and asked him the questions, and then I will read from the deposition.

By Mr. Gentry: And then you went way beyond that.

By Mr. Edwards: No, sir; I stayed around the body, and he would pick out a question and answer and say, "I said this, but I didn't say the one following it," and I have had to show these.

[fol. 51] By Mr. Gentry: If by any chance I get a chance to state my ground, I would like to state it, if it is agreeable to Court and Counsel.

By the Court: It is agreeable to the Court right now, it has been right along.

By Mr. Gentry: Not only did Mr. Edwards show the witness his deposition first, but in a number of instances he read the questions and answers first, and then asked him if he said those things. Now, if he proposes to do that same thing now, it will be too late to make any objection that would do us any good, if he is allowed to read the things before we make the objection. Therefore, we object to his reading them, and I ask him if he intends to read them. And if he intends to ask the witness if he said these things, and then the witness denies it, then I can make an objection. But if, on the other hand, he reads the things first, and I do not object now, then I will be too late.

By Mr. Edwards: Don't you recall I asked this witness about going down there and seeing the body, and the witness started denying that he had seen it?

By Mr. Gentry: Yes, sir.

By Mr. Edwards: And all of the rest was gathered right around, how he had seen him, about the injury on his face, and on the back of his head, and he said at all times that he was laying with his face down. We have gotten down to that question, and all I want to do is to make my case in the proper way.

By Mr. Gentry: I object to his reading it.

By the Court: Can't it be agreed that you do that for impeachment?

By Mr. Edwards: You have both in this case, the question of impeachment and *res gestae*. My client is entitled to both benefits. I don't want these gentlemen to try to narrow me down and take away my rights in the trial.

[fol. 52] By Mr. Gentry: In either event, he ought to ask the question first.

By Mr. Edwards: I told you I wanted to lay my foundation and ask some questions first.

By Mr. Gentry: I don't like the funny way you lay foundations.

By Mr. Skinker: May I make a suggestion?

By the Court: Yes, sir.

By Mr. Edwards: If you start to object, I will let you go ahead and make your record, make your record at any time.

By Mr. Gentry: That will be your record if you do that.

By the Court: Now, Mr. Skinker, what do you have to say?

By Mr. Skinker: If this witness were asked the question by Mr. Edwards, "Did you hear someone down around the scene of the accident make a statement as to how they thought the accident happened," or "What hit or struck that man," such questions we have no objection to him asking whatever. Such question would call for purely hearsay testimony, and we could object to it on that ground, and Your Honor could rule, and I think no doubt would sustain it. Now, the plaintiff in this proceeding is attempting to do by indirection what he cannot do directly. In other words, he is about—I think it is obvious—to read to the Jury these questions and answers which I have just read to Your Honor, and dictated into the record, in order to get the poison of the hearsay before the minds of the Jurors. And we say he has no right to do that. And we think Your Honor's ruling should be that he must ask the question of the witness, "Did you hear any statement made by witnesses at the scene of the accident with reference to how the accident happened," or how they thought the accident happened, and then our objection would follow to that as purely hearsay. And we think it would be sustained, but it could be ruled upon, and we could proceed [fol. 53] in an orderly way, and that is the way we ask it be done, and that is the purpose of our objecting to this now, so that Your Honor can see our position, and also see the position we will be in if all of this is read to the Jury, and the poison goes before them, and this testimony goes in, because then, no matter what Your Honor rules, it is in, and the poison is there. That is why we ask Your Honor at this time to make a ruling that he must proceed as I have indicated, to ask the question of the witness as to whether he heard any statements, not what they were, but whether he heard any statements, and then to let us

put our objection in, and not to proceed by reading the portions of the deposition.

By Mr. Edwards: Now, you see, Your Honor, they come back to the same thing. They want to instruct me how to try this case in a certain way. They say they are not dictating, but they are asking Your Honor to tell me that I have to ask a certain question in a certain way. I have a right to lay the foundation to question this witness according to my own ideas, and according to the rules of evidence. As to Mr. Skinker, I don't want to shut him or Mr. Gentry from making any objection, but I want to make my record proper, and I think I have a right to try this case in my own way. I don't think you gentlemen should ask the Court to instruct me how to ask a question. I may not ask it just right, but then I have my own ideas about it.

By Mr. Gentry: We are asking the Court to tell him how not to do it.

By Mr. Edwards: That is not only improper, but I have never asked His Honor to instruct you gentlemen how to try your case. You do that in your own way, and I will try it in my own way. That is all I want to do.

By Mr. Gentry: Have you no reference to the rules of evidence at all?

[fol. 54] By Mr. Edwards: That is according to the last controlling decision of the Supreme Court.

By Mr. Gentry: I haven't seen it.

By Mr. Edwards: If you read the famous Pulitzer case, I read it at noon.

By Mr. Gentry: It don't lay that rule down.

By Mr. Edwards: I am proceeding exactly according to that case, according to the Supreme Court's last ruling.

By the Court: Well, this Court is inclined to follow the rulings of the Supreme Court at all times.

By Mr. Edwards: That is all I want to do.

By Mr. Gentry: You had better get that case and let us look at it. I don't think that case announces that you can go at it that way.

By Mr. Edwards: Your Honor, I will call to your attention that Judge Cave in the Pulitzer vs. Chapman case had testified that the administratrix had discussed the making of a will with him several times. He testified in the deposition Mr. Chapman, the man accused of things, was present. And then later on at the trial, this witness said he

was not present, and the Supreme Court said that Judge Cave's statements should be read, it was up to the Jury to decide which one was true, whether he was there or was not there. And they sent that case to the Jury solely on that statement. I happen to have another case, *Loehr vs. Stark*, a case that they beat me on, just about a year before, and they said I showed no circumstantial evidence of undue influence, but they said in the *Chapman* case about a year later that there was some evidence, and it was that evidence where Judge Cave had sworn in the deposition that the man was present, and he swore at the trial he was not present.

By Mr. Gentry: This man has not sworn at all on this trial.

By Mr. Edwards: He has sworn he was down there, and he saw this man lying on his face. He testified to what happened there—

[fol. 55] By Mr. Gentry: (Interrupting) Judge Cave was asked certain questions and answers given by him, was asked about the questions and answers. And then to impeach him, the deposition that he had given previously was read. Now, that is what we say is right. He proposes to read the deposition first, and then say to him—then show it to him—and say to him, "Did you say that?" Ask the man the facts, let him testify, and then if you can impeach him, all right.

By Mr. Edwards: You know I first asked this man about seeing this body and everything, and he said he did not see the body, and then I was compelled to read the deposition to him, that is the way I am proceeding.

By Mr. Gentry: You have not asked what people said down there.

By Mr. Edwards: Well, you gentlemen blocked me on that, or I would have asked him.

By the Court: Well, we will proceed according to the latest rulings of the Supreme Court: They don't always agree with me, but I always bow to them for some reason. Objection overruled.

To which ruling of the Court, the defendants, and each of them, by Counsel then and there duly excepted at the time, and still continue to except.

By Mr. Skinker: May it be understood that we will not have to continually renew this objection as to this character of hearsay testimony, because there is question after question about it, and I do not think it is necessary to renew this objection?

By Mr. Gentry: I don't like to interrupt you every time, but I would have to interrupt you on almost every question.

By Mr. Skinker: I think if Your Honor allows this line of objection to be considered in, it will not be necessary for us to repeat the objection.

[fol. 56] By the Court: Whichever way you gentlemen want. If you can agree on that, all right, if you can't we will rule on each question as it is asked. Bring the Jury down, Mr. Sheriff.

(The further following proceedings were then had in the presence of the Jury:)

By Mr. Edwards: (To Witness Drashman) Now, did you examine this train, Frisco passenger train Number 106 that came in to the station at Memphis there on the evening of December 21st, 1939, after that train came in?

A. Yes, sir; I made an examination of it.

Q. Did you examine both sides of the train?

A. Yes, sir.

Q. Did you examine that which would be the fireman's side of that train?

A. Yes, sir.

Q. I say, which would be the fireman's, that would be the left side, wouldn't it?

A. Yes, sir.

Q. Did you examine the engineer's side of that passenger train?

A. I made an inspection of that train first, and then I went over on the right side, and the car inspector, Armand, he was making an inspection of what we call the right side, and then he and I went back on the left side again, yes.

Q. Did you particularly examine the left side of that train?

A. No more than I did the right.

Q. Well, I will call your attention to your deposition about that. Listen to these questions and answers, Mr. Drashman.

"Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side?

A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side.

Q. Oh, you particularly examined the fireman's side?

A. Yes."

Do you remember answering those questions in that manner in your deposition?

A. Yes, you asked me if I made an inspection, and I told you yes.

[fol. 57] Q. Well, I have just read to you the last question and answer, "Oh, you particularly examined the fireman's side?

A. Yes".

Don't you recall testifying to that?

A. I remember telling you I made an inspection of it, yes sir.

Q. Don't you remember telling me that you particularly examined the fireman's side?

A. No sir; I do not.

Q. Well, what I have just read to you, did you so testify in that deposition?

A. I don't remember it if I did.

Q. You may have testified to it?

A. I may have.

Q. Well, is it true, what I have just read to you?

A. That I made an inspection of the train, yes, sir.

Q. What I have read to you, is that true?

A. No.

Q. All right. Now, the next question along that same line: "Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did the engineer's side? A. I looked at that very close."

Did you so testify?

A. Yes, sir; I did.

Q. And that is true, is it?

A. Yes, that is it.

Q. Why did you examine one side closer than the other?

A. Do you want me to answer that?

Q. Yes, sir.

By Mr. Skinker: We object to his answering that question, if it deals with any hearsay testimony, or of any matters he may have heard, particularly if it deal with

any party's expression of opinion as to what their thought might be as to how the accident occurred.

By Mr. Edwards: I can't anticipate what this witness will say, Mr. Skinker.

By Mr. Skinker: Let me finish; and that such testimony would be hearsay and incompetent, and we therefore object to his going into that question at all.

By Mr. Gentry: I object to that question because it is very evident in view of what is contained in the deposition of this witness to which Your Honor's attention has been called, and which Mr. Edwards now has in his hand [fol. 58] and is endeavoring to bring out from this witness, the same matter in the deposition, to which we have objected, and therefore I object to it because it is evident he is asking the question to get his reason and bring in this hearsay testimony as the reason.

By Mr. Edwards: I don't think that is evident. I don't think you can anticipate what this witness will say, unless you know.

By Mr. Skinker: May I join in Mr. Gentry's objection, and include that in my own?

By the Court: Yes sir; objection overruled.

To which ruling of the Court, the defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

(Question read by Reporter: Why did you examine one side closer than the other?)

A. Because I was told by one of the switchmen, I believe, if I remember right, that this man was supposed to have been struck by something protruding on the side of this train.

By Mr. Skinker: Now, we object to that answer, and ask that it be stricken, because it is purely hearsay, and further, because it is not identified as to the person who is supposed to have made the statement, and it deals with an expression or a conclusion on the part of the person who made the statement. There is no showing that the person who made the statement was present or saw what happened. The person who made the statement would be invading the province of the Jury in stating a conclusion of his own, in making the statement, and the answer is

wholly improper, and the hearsay testimony should be stricken out.

By Mr. Gentry: We also object to it for the same reason, and ask that it be stricken.

By Mr. Edwards: I want to ask this witness where he got that information.

[fol. 59] By the Witness: Your Honor, could I explain?

By the Court: No, just answer the questions.

By Mr. Skinker: You are overruling my objection?

By the Court: No, are you through?

By Mr. Edwards: I want to find out where he got that.

By the Court: Are you through with that particular question?

By Mr. Edwards: No sir; I want to pursue that some more: (To Witness) I take it that it was a railroad employe, a brakeman or switchman, is that it, said that?

A. A switchman, I think.

Q. And where did he make that statement to you?

A. Out there on the ground where this man was supposed to have been struck.

Q. Haney?

A. Yes, sir.

Q. Was that when you went down there to where this switch was that Haney had thrown to let the Frisco train in at that time?

A. It was down there in that location, yes, sir.

Q. It was down there at the time you first went down there to investigate when you heard that Haney was hurt?

A. I didn't go down there but one time, but that was the time, yes, sir.

Q. And is that the time?

A. Yes, sir.

Q. Was it made down there at the switch which Haney threw to let this Frisco train in?

A. No, sir; it wasn't at the switch, it was in that location around there, see?

Q. Well now, do you know who this switchman was?

A. I do not.

Q. Could he have been a switchman for the Frisco Railroad?

A. No, sir; I think it was the Illinois Central man, if I remember right, the I. C. man.

Q. When you say 'I. C.', do you mean the Illinois Central Railroad?

A. The Illinois Central Railroad, yes, sir.

Q. I will ask one more question, and then you make [fol. 60] your foundation. Wasn't this statement made, that you have just stated, down there when you went down there and saw Haney's body lying there at the switch, isn't that true?

A. No, sir.

By Mr. Edwards: Then, Your Honor please, I will ask to read this part of the deposition. Now, if you want to make an objection to the reading of it—

By Mr. Skinker: (Interrupting) I want to move that the testimony of this witness as to what he heard someone, switchman or other person, say about how he thought that Haney got injured, be stricken out as purely hearsay.

By Mr. Gentry: I make the same motion for my client.

By the Court: Motion denied.

To which ruling of the Court, the defendant, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

By Mr. Edwards: Now, I will ask you—Pages 199—if you do not recall testifying to this in your deposition?

By Mr. Gentry: Now, I object to his reading that portion of the deposition. It is very apparent he is starting to read the very part to which we objected before the jurors were brought in.

By Mr. Edwards: That is the part. I understood we would make the record. We have gone over the particular points of law, and I want to make the offer.

By Mr. Gentry: I want to renew my objection to it, for the reasons stated.

By Mr. Skinker: The Defendant, Frisco, renews its objection for the reasons already stated.

By the Court: Very well, the same ruling.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

[fol. 61] By Mr. Edwards: Do you recall testifying to what I will read to you, on Page 199? "Q. And you didn't ex-

amine the engineer's side quite so close? A. Not so close, no." Do you remember testifying to that?

A. Yes, I do.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. Why was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man. Q. You mean Haney? A. Yes." Do you remember testifying to that?

A. Yes sir.

Q. That is true, isn't it?

A. If Your Honor would allow me to explain—

By the Court (Interrupting): Just answer the question.

By Mr. Edwards: That is true, isn't it?

A. Yes sir.

Q. The next question: "Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened." Did you so testify?

A. Yes.

Q. And that is true, isn't it?

A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes sir.

By Mr. Edwards: Explain any answer you want to.

By the Witness: What I was going to do was to explain why I made a closer inspection on one side than the other. It seems like he is stressing very heavily on that.

By Mr. Skinker: May it be understood our objections are renewed to all of these questions with reference to this hearsay testimony, what he heard somebody say?

By the Court: The same ruling.

By Mr. Skinker: And we will have to make objections every time.

By the Court: Yes sir; the same ruling.

To which ruling of the Court Defendants, by their Counsel, and each of them, then and there duly excepted at the time and still continue to except.

[fol. 62] By the Witness: I want to go into detail and show why I have to make a closer inspection of one side than the other. If that side is in an accident—

By Mr. Gentry: (Interrupting) I object to going any further on that.

By Mr. Edwards: Do you want to hear what he wants to explain?

By Mr. Skinker: We will object to that.

By Mr. Edwards: All right, we will proceed then. Now, Mr. Skinker, there is a further answer to that same question, where you made an objection.

By Mr. Skinker: Just a moment, we object to that. We object to that answer and ask it be stricken out as purely hearsay, "That is all—I didn't get who it was." That is really part of the other.

By Mr. Gentry: He says, "I didn't get who it was."

By Mr. Edwards: The witness says, "That is all," and Mr. Skinker interrupted the witness, and the witness said, "That is all—I didn't get who it was." You testified to that, didn't you?

A. Yes.

Q. And that is true, isn't it?

A. Yes.

Q. "Q. (By Mr. Edwards) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there." "Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground." Do you remember testifying to that?

A. No, I didn't mention the body.

Q. And what I have read to you then, you did not testify to?

A. No sir.

Q. You deny that you testified to that?

A. Yes sir; in those words that you have, yes sir.

Q. The next question, "Q. Where Haney's body was laying on the ground? A. Yes. Q. That is where you heard this statement made? A. Yes sir". Do you remember testifying to that?

A. No sir.

[fol. 63] Q. "Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there."

A. That is right.

Q. You testified to that?

A. Yes sir.

Q. "Q. That is what you heard there." Now, shall I read the objection, Mr. Skinker?

By Mr. Skinker: Yes sir.

By Mr. Edwards: (Reading) "Mr. Skinker: Just a moment: I want to object to that as hearsay and improper and may it go to all similar questions? By Mr. Edwards: Yes." Now, the next question: "Q. That was down there when you first went down and saw Haney's body? A. Yes." Do you remember testifying to that?

A. No.

Q. That is when you first went down there, is that true?

A. I did not go down there but one time.

Q. Well, part of that answer is right, isn't it?

A. Yes sir.

Q. When you first went down there?

A. Yes sir.

Q. That is where you heard this statement made?

A. Yes sir.

Q. "Q. You heard someone there where the body was, saying that they thought something sticking out on the train hit him, is that right? A. That is right." Did you so testify?

A. Yes sir.

Q. And that is true, isn't it?

A. Yes sir.

Q. "Q. When you heard that you went back and examined the train? A. That is right." Is that right?

A. That is right.

Q. And you so testified?

A. Yes sir.

Q. "Q. Now, is it possible this mail hook could have hit him"? Wait a minute, I did not lay the foundation.

By Mr. Gentry: Just a moment before we pass to that subject.

By Mr. Edwards: That is right. I have finished with it, to that point.

[fol. 64] (At this point the following was had out of the hearing of the Jury.)

By Mr. Gentry: Now, on behalf of the Illinois Central, I have a motion to make, and I want to preface it with these remarks. Counsel was fully advised in advance as to the objections that would be made to the questions that he has asked, as to the impropriety of them. He has persisted in reading this in the presence of the Jury, and has thereby brought in hearsay testimony in a way that is most prejudicial, and has embodied in it testimony as to the opinions of unknown witnesses. And therefore we think that there cannot be a fair trial for this defendant in this case from this point on, because such testimony was improperly brought in, and it has prejudiced the minds of the jurors to such a point that they cannot give us a fair trial, regardless of what the Court may say in its instructions, and the other evidence. And we therefore ask that the Jury be discharged and a mistrial ordered.

By Mr. Skinker: Defendant, Frisco Trustees, has moved that the testimony referred to, which has been read and which has been dictated into the record by the defendants' counsel, that be stricken out, and the Jury instructed to disregard it. We then join in the motion with the Illinois Central Counsel, Judge Gentry, in asking that on account of the prejudicial matter that has gone before this Jury, dealing with the most vital part of the case, that the Jury be discharged, and a mistrial declared.

By Mr. Gentry: Let me say to Your Honor, I would like to have my motion to strike out embodied ahead of the motion to discharge the Jury.

By the Court: Motion denied.

To which ruling of the Court, the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

[fol. 65] By Mr. Gentry: Then I renew the motion I have made to discharge the Jury, and for the reasons stated.

By the Court: Motion denied.

By Mr. Skinker: The Frisco renews its motion.

By the Court: Motion denied.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

By Mr. Edwards: All of the matters that I have just asked you about, the statements that you say were made, as I understand, were made down there near that switch that Haney threw to let the Frisco train in?

A. Yes, sir.

By Mr. Edwards: Now, Your Honor, might I offer the excerpts I have read from the deposition of this witness into evidence without re-reading them, as a part of the examination?

By Mr. Skinker: I think they are already in evidence.

By Mr. Edwards: I want that understood. The questions I have read and you have checked me, that they were correctly read and as set out in this deposition.

By Mr. Skinker: Yes sir: I think so.

By Mr. Edwards: I want to offer those statements in evidence as part of the examination of this witness.

By the Court: The record may so show.

(Mr. Edwards thereupon resumed examination of the witness as follows:)

Frisco train No. 106 had a mail car on it which was near the engine. On the side of the car it has what we call a mail pouch catcher. Some people call it a mail hook. The lower part is of iron about $\frac{5}{8}$ of an inch thick and is round and has a little curly tail at the bottom which is also round. The hooks fasten on a pivot. They do not swing unless you pull them down. They are not fastened to the side of the train. When the mail clerk inside of the [fol. 66] car pulls down on the handle it raises vertically out. In other words it sticks out 25 inches, 2 feet and 1 inch. But you have to pull down on the handle on the inside of the car to swing it out. None of them swing out about 3 feet from the side of the train. In my deposition I testified that there was one hook on each side of the car; that it was iron and V shaped; that one side of it is fastened through brackets on each side of the door posts and the other hangs down against the side of the car with a handle on top and that it can be extended out to the side of the train. I don't think I told you it could be extended out 3 feet, because I know better than that. That is not true. I did not tell you that. These hooks are loose so that you can go along the side of the train and raise them

up with some effort. You cannot lift one of them with your little finger, there is too much weight to lift that with your little finger. I testified that probably you, who are a little taller than the average man, could raise them, and that is true.

There was a little raised place north of the Frisco track. I didn't measure how high it was but it was about 18 to 20 inches above the rail. That mound was there when I went down there after Haney was killed.

Cross-examination.

By Mr. Skinker:

I was up in the station on the evening of December 21, 1943. I recall going down to the scene of the accident. I was down there, I don't think it was over 15 or 20 minutes at the most, maybe not that long. Then I went back to the station and I started to inspect one side by myself and then I met the car inspector L. J. Armand. He is dead.

That was a routine inspection that Mr. Armand was making; in other words, the car inspector would go over the train every night when it got into Memphis. He looked for anything that might be defective around the train. A [fol. 67] car inspector is the man that you see around passenger stations at night, going along with a lantern and flashing it at the wheels and sides of the train.

Armand was there inspecting the train when I got back. I continued with him, and he and I went back around to the left side of the train. When anyone is found in the yards where a train has gone by and there is any possibility of the train being involved, it is our duty to make out an inspection on a form we call form 171, which is a regular equipment inspection form that we have to make a report on regardless of whether the train was involved in it or not. Armand and I together made the inspection and made out the form together.

I inspected both sides of that train. I inspected the mail car which was right behind the tank of the engine.

We did not find anything on either side of the train in the way of an object protruding out from the side of the train. We did not find any rods, stick, wire or any kind of object. We looked for anything that might be sticking out.

The baggage cars and mail cars have sliding doors on the inside of the cars about 6 inches from the outside. They slide back and forth along the inside wall of the car.

The coaches and Pullmans have what are commonly called vestibule doors. They swing towards the inside before you can raise the trap door. There are no doors on any passenger car that swing towards the outside.

The mail arm is on a bracket across the door of the car and it is worked by the U. S. postal man on the inside pressing down a handle. He has to open the door first and then he pulls down on the handle on the inside of the car. It is about 18 inches long on top of this mail pouch catcher that swings the bottom part of the catcher out. If he does not hold the handle down the catcher goes right back against the side of the car.

[fol. 68] When a passenger goes up the steps onto a passenger coach or Pullman car there is a handle for him to take hold of as he starts up the steps. That sticks out about 3 inches from the side of the car. When the mail catcher arm is hanging down by the side of the car it does not protrude out as far as the hand rails of the coaches. There is a hand rail on the mail car door and the mail catcher stands out 5.8 inches, which is the clearance of the iron itself. It is resting against the grab iron and extends out $\frac{5}{8}$ of an inch farther.

From the top of a tie on the track it is 8 feet $11\frac{1}{2}$ inches to the center part of the bracket of the mail catcher arm. That is the bracket that holds the arm. So when the mail catcher arm itself is extended out horizontal, like it would be in catching a mail pouch, the arm itself would be a little over 8 feet above the top of the ties.

Cross-examination.

By Mr. Gentry:

When Mr. Edwards asked me a while ago if the dump or dirt was north of the track, next to the switch that we have been talking about, I did not mean to say that it came right up against the switch. Mr. Young and I stepped it off that night and if I remember right, it was 15 feet away from the switch.

I do not know who made whatever statements were made down there at the scene of the accident. I am referring to the place near the switch that Haney threw. Whatever

statements were made to us there by people who came up into the crowd were made by someone, but I don't know who it was and I don't know whether the person or persons that made such statements were present when the accident happened or not. I don't know whether they claimed to have been present or not and I don't know how soon they got there after the accident was over.

When I got my first information about Mr. Haney being [fol. 69] hurt, I was around the station master's gate in the station and then Mr. Young came through and he says: "Let's go out on Broadway; I understand Haney got hurt." That was the first information I had. We walked down there. It is about a half mile from the station gates.

By Mr. Skinker: Now, Your Honor, in view of the testimony, I want once more to renew the motion that the testimony as to the hearsay, what he heard somebody say, be stricken out. It is too far removed from the accident and not by anyone who saw it or purported to see it.

By Mr. Gentry: I make the same objection, the same motion on behalf of my client.

By the Court: Motion denied, both motions.

To which ruling of the Court the defendants, and each of them, by counsel, then and there excepted at the time and still continue to except.

Redirect examination.

By Mr. Edwards.

I suppose it was an Illinois Central switchman who made the statement to me about something sticking out of the train hitting Haney. There was no Frisco switching around there at the time. I said that the statement was made by a railroad switchman because there was a gang of switchmen around him when I got there. They all had lanterns. I had my flash light. I said a moment ago that the man who made the statement was an Illinois Central switchman down there at that switch that Haney had thrown. I think that is true, no one else was around there but IC men at that time. I know it was a railroad switchman there in the yards and the statement was made in the location near the switch. There were several people there when the statement was made, and that was the one time I went down there.

The mail pouch hook that Mr. Skinker asked me about extends about 26 inches when it is raised preparatory to [fol. 70] catching a pouch. If it was raised up it would be extending about 26 inches from the side of the train, but they would have to open the door to do that.

I have been watching them back in there off and on for 40 years. As they backed those long trains in there the side doors on the express cars and mail cars are shut. I have seen them open after they backed into the depot. I never saw any open as they backed into the depot. When a man is working in there he is supposed to keep those doors closed. After they leave the main track and get out on the main line where I was I have seen them opened.

I was down at the switch where the accident happened longer than 3 minutes because Mr. Young and I walked around the place and stepped off the distance from the switch to the spot. And I talked to some of their city detectives there for awhile. I claim that I was there when Haney's body was not there. I did not testify in my deposition in speaking of what had struck Haney that it could have been a round pipe; that he was not turned over while I was there and that I was there about three minutes and that I returned to the place after the body was moved. That is not true and I did not make those statements. As I told you, I never did see the body.

Plaintiff's counsel thereupon offered in evidence the entire deposition of said witness Drashman from which he had been reading to the witness on the stand.

Both counsel for the Frisco Trustees and counsel for Illinois Central Railroad Company thereupon objected to the offer of said deposition on the grounds previously stated by them respectively.

Which objections were by the Court overruled; to which ruling of the Court the defendants and each of them, by counsel, then and there duly excepted at the time and still continue to except.

[fol. 71] Omitting formal parts, said deposition, in narrative form, is as follows:

JOHN JOSEPH DRASHMAN

My name is John Joseph Drashman. I live in Memphis, Tenn., and am employed by the Frisco Railroad, as coach

foreman of passenger equipment, to supervise cleaning and repairs of all passenger equipment, and I occupied that position in December, 1939. I believe I knew Lyman Haney, I was not well acquainted with him, but I know where he worked as a switch tender.

I was up around the station master's office on December 21, 1939, when I heard there was an accident. I went down to the switch tender's shanty. I don't think the body was by any switch. I saw Haney's body but I didn't measure how far it was from the Frisco tracks. My best judgment would be about 6 feet. I believe the head was toward the west and he was lying on his face with his back up if I remember right, but I am not sure, because I didn't pay that much attention to it. He could have been facing east.

Mr. Young, our superintendent of terminals, and I went down there together. I don't know who was there when I arrived. There were several parties there and I think this I. C. switch engine foreman, Brusco, was there and several of the city plain clothesmen were there. The men I speak of were there when I got there.

I saw what looked like a hole knocked in the back of Haney's head, like someone had struck him with a blunt instrument of some kind. It looked like a caved in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something. That could have been with a round pipe. I did not see Haney's face. He was not turned over so I could look at his face while I was there. I imagine I remained there about three minutes. [fol. 72] I returned to the place after the body was moved. There was a spot of blood there about six inches across which I judge was about 6 feet, or something like that, from the Frisco track. I mean south of that track where the Frisco backs in. That track runs generally east and west and the blood was south of the rail, I don't know just how close to the switch. I saw the blood after his body was removed. I did not see it while the body was there. I saw blood on his head there.

I returned to that place the same night and Mr. Young and I were down there together. He went with me both the first time and the second time. The second time we were there, there were three of the plain clothes city detectives, I think. I don't know who they were. I did not

measure the distance from where the blood was. There may be what you call a mound; there is a pile of dirt piled up there. I don't know where it is with reference to the switch. I don't know just whether it was north or south. I didn't pay any attention to it. I imagine it was about two feet above the rail and it was several feet long. It extends both east and west of the tracks.

I supervise repairs and cleaning of equipment on such trains as this Frisco No. 106.

After Haney was found, I examined that train in the station after it was backed in under the shed. After I learned of the accident, I went down and saw Haney and came back and examined the Frisco train. I did that personally to see if there was anything protruding on the side of the train, any grabholds, any handles or anything outside of the cars. I believe there were nine cars. They had a combination mail and baggage, two baggage cars, two coaches, diner, and two sleepers. There was one mail car, combination mail and baggage. I looked along that train and found nothing. I looked because that is customary if we have a report of any kind of an accident, [fol. 73] whether we are involved in it or not, to make an inspection. We do not examine a train like that if we have no report of an accident. We have an inspector who does that kind of work. I made a special examination on this occasion and found nothing wrong.

There was a hook on each side of the mail car. It is iron, V shaped. One side of it is fastened through brackets on each side of the doorposts, and the other hangs down against the side of the car, with a handle on top. That can be extended out to the side of the train, you can swing it out three feet to the tip end of the hook. The body of a mail car extends out not over 14 inches beyond the rail. No other part of the train extends out any farther to the side. I went around both sides of the train, but particularly on the engineer's side—on the—it was on the fireman's side. I looked at the fireman's side very close and I didn't examine the engineer's side quite so close, because someone said they thought that train No. 106 backing into Grand Central station is what struck Haney. The man who told me that at the scene of the accident didn't see the accident. I heard someone say that is what happened. I didn't get who it was. I don't know who it was, I just heard them

talking around there down where Haney's body was laying on the ground. Someone said they thought something sticking out on the train hit him. That was down there when I first went down and saw Haney's body. I heard someone there where the body was saying that they thought something sticking out of the train hit him. When I heard that I went back and examined the train.

It is not possible that this mail hook could have hit him, because the body was too far from the north rail and it is above the average height of a man's head. I don't know that the north side of the rail would be lower than the south. I don't think that there is that much elevation there [fol. 74] to cause the equipment to lean any to the north. I would say it was not.

These hooks are all standard; they do sometimes get bent, but very seldom. They do not sometimes swing out from the side of the train, the weight holds them against the side of the car. They do not tie them to the side of the train, the mail clerk has got to use them. The last time I was in the Frisco yards was about 12:15 today. I was down at Grand Central station last night. I don't know that they have got one tied down there right now. If they have, I haven't seen it. I have never seen them that way.

Switch tenders like Heney have no duty to perform under my supervision and I do not know a thing about their duties.

I never saw Haney after that first time I went down there that night. I do not know how soon they removed Haney's body after Mr. Young and I first went to the scene where he was found.

This Frisco train that I have described had two baggage coaches. I do not know what they were carrying because various commodities were shipped by express companies at that time.

I imagine they were pretty heavily loaded, but I don't know. I don't think the train was any heavier than usual on account of its being just before Xmas time. I think the number of coaches was about what they have as a rule.

Cross-examination.

By Mr. Skinker:

The lever I have been talking about is called a mail pouch catcher. It is the metal rod that is V-shaped and used to

pick up packages, usually of mail, while the train is in motion. The agent hangs the mail on a hook and while the train is in motion the mail clerk swings that handle out that way and that catches the sack in the V shape there. [fol. 75] There is no way to move that handle except as the U. S. mailman in the car moves it. It moves from in the doorway. In other words he presses down on the handle on the inside of the car, and that brings the pouch catcher up on the outside about 8 feet above the rail. I believe I knew Mr. Haney in his lifetime. I believe he was about my height and I am 5 feet 6.

I examined the entire train from the front to the back and on both sides and found nothing out of kilter or nothing irregular on any part of the train. There was no kind of rod or pipe or mail pouch catcher or anything of that kind standing out from the side of the train on either side, on the occasion in question. There was nothing out of line whatever. Everything was in its regular normal place.

Redirect examination.

By Mr. Edwards:

Probably you could go along the side of the train and raise these mail hooks up. They are not fastened down to the side of the train at the bottom. You can raise them up, but they will not swing out with the motion of the car.

Cross-examination of the Witness at the Trial.

By Mr. Gentry:

As to the man who made the statement about something sticking out of the train, I thought he was an Illinois Central switchman; but as a matter of fact, I did not make any investigation or any effort to find out whether that man was working for the Illinois Central or for the Yazoo & Mississippi Valley Railroad, and I do not know what railroad company that man was working for.

Redirect examination.

By Mr. Edwards:

I do know though from his appearance that he was a railroad switchman. He was dressed and had all the appearance of a railroad switchman.

[fol. 76] I saw blood on the mound, not near the switch, about 15 feet from the switch. I do not remember testifying that this blood that I saw was within about six feet of the track. I did not measure the distance and I did say in my deposition that I judged it to be about six feet from the Frisco tracks. I told you it was north of the track; I did not tell you it was south of the Frisco track that I saw the blood. The mound is north of the track. There is no mound south of the Frisco track. I did not testify in my deposition that the blood was about six feet south of the track. I did not go down there twice. I did not testify in my deposition that I went there twice. I told you that Mr. Young and I went down there one time together.

Plaintiff next offered in evidence the deposition of W. E. Turner, Jr., given on the 16th day of December, 1941, which was objected to by counsel for the Illinois Central Railroad Company because that company was not a party to the suit at said time.

By Mr. Hart: The deposition is solely against the Frisco Trustees, Your Honor, please.

By the Court: Very well.

Said deposition is as follows (omitting formal parts):

W. E. TURNER, JR., being duly sworn, on his oath deposes and says in behalf of the plaintiff:

My name is Wiley E. Turner, Jr. I am a physician and surgeon, graduate of the medical school of the University of Tennessee in March, 1939.

I have been practicing with my father, who is a physician, in Piggott, Arkansas. We were operating a clinic at that place when I was called for service in the medical department of the U. S. Army, and I am now stationed at Fort Leonard Wood.

[fol. 77] In March, 1939, I was an interne in St. Joseph Hospital in Memphis, Tennessee. On December 21, 1939, I was called to examine Lyman Haney. The main thing I was called on to do was to decide that he was dead, because he was dead, and I just pronounced him dead. I went over his body externally and then we carried him to the morgue and I assisted in the autopsy.

The photostatic copy which is now marked Plaintiff's Exhibit 1, is a correct copy of the record of St. Joseph Hospital in Memphis, Tennessee, relating to the case of Lyman Haney. Some of the entries were made by me. All of the findings at the autopsy are included in the hospital record. The cause of death was an injury to the skull and the hemorrhage from the skull injury. There was an extravasation of blood into the scalp, temporal and occipital muscles adjacent to the abrasion. There was a fracture of the calvarium radiating down from the abrasion to left and right involving right parietal, occipital right and left sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. Our conclusion was that the skull was fractured by some fast moving small round object. I guess it would be possible for that small round fast moving object to be a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe. The other two physicians who took part in the autopsy concurred in my conclusions, and they were written into the hospital records as our opinions. That small round fast moving object, as far as I know, could have been a moving object attached to a backing train going 8 or 10 miles an hour. I couldn't say it was or anything about it. We didn't have a lot to go by, except what was on the body. I reckon it could have been that.

[fol. 78] Cross-examination.

By Mr. Studt:

I wrote a part of the hospital record and I stated in there that the fracture of the skull followed a blow applied to the head posteriorly, perhaps by a piece of iron pipe. It is possible, I would say it was possible, for it to be a small iron pipe, or something like that in other words. It is very possible in my opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object also in the hands of some individual.

PLAINTIFF'S EXHIBIT 3

Plaintiff next offered in evidence a photostatic copy of the hospital record, marked "Plaintiff's Exhibit 3." It is

unnecessary to set out the entire record. On the first page thereof, under the heading "Physician's Report," is found:

"Diagnosis: Fractured Skull, Subdural Hemorrhage.

Treatment: Dead when arrived.

Where and How accident occurred: Railroad yards, cause undetermined, fractured skull by fast moving small round object.

Patient's general condition: Deceased.

What disposition was made of case: To morgue for autopsy.

(Signed) W. E. Turner, Jr."

Under the heading "Brief History" it is stated that there was an abrasion to the right posterior part of head approximately 5 centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions. The right side of the face was covered with dirty cinders ground into the face. The lips were bruised and cinders and blood and artificial teeth were in the mouth.

[fol. 79] The report of the autopsy which was embraced in the hospital record, showed no injuries or deformities aside from the injury to the skull. The portion of the report dealing with the skull is identical with that given in the testimony of Dr. Turner.

The anatomical diagnosis was given as follows:

Traumatic fracture of skull with associated meningeal hemorrhage. The cause of death was given as "The fracture of skull followed blow applied to head, posteriorly perhaps by a piece of iron pipe."

Plaintiff next offered in evidence as against the Trustees of the Frisco Railroad, only, the deposition of RUSSELL KAUREZ, which (omitting formal parts) is as follows:

My name is Russell M. Kaurez. I live in Memphis, Tennessee. In December, 1939, I worked for Thompson Brothers' Mortuary, as an ambulance driver. On December 21, 1939, in the evening, I was called to the railroad tracks and Florida Avenue to pick up an injured man by the name of Lyman Haney. It was dark and I couldn't give you the exact distance from Florida Avenue to the point where we

picked him up. We put him on a stretcher. I judge he was lying between about 7 and 10 feet from the Frisco track. That is just an estimate, of course. I remember he was lying on the side of a little hill about like that shown in Defendant's Exhibit B. It seems to me it was north of the track. It was not later than 8 o'clock in the evening—it was before 8. That's all I know about the case.

[fol. 80] JOSEPH FELDMAN, being duly sworn on the part of the plaintiff, testified as follows:

My name is Joseph Feldman. I live in St. Louis, am a shorthand reporter, have reported at times in the Circuit Court here and have been in business about 17 years. I take depositions and do court work, etc. I report meetings like conventions.

The deposition filed in this case on August 29, 1941, taken at Memphis, Tennessee, on May 1, 1941, of John Joseph Drashman was taken down in shorthand by me and written up on the typewriter. You asked me to go over this deposition this morning and I did so and compared it with my notes. The typewritten deposition agrees with my notes. All of the statements written in that deposition in the testimony of Drashman were correctly written down by me, and the deposition is correct in every respect according to the notes.

JULIA HANEY, the plaintiff, being duly sworn in her own behalf, testified as follows:

My name is Julia Haney. I live in Memphis, Tennessee, and have been living lately with my son near an army camp, which is Camp Van Dorn, in Mississippi. Lyman Elmer Haney was my husband. We were married on May 18, 1912. Two children were born of that marriage and are living. One is Alvin Arthur Haney, who is 29, and the other is Margery, who is now Margery Haney Linsom, and is 25. Both are married.

At the time of Haney's death, we were living at 37 West McKeller in Memphis, Tennessee. We had always lived together and he had always supported my children and me.

Q. Now, who did he work for?

[fol. 81] On objection being made to the witness' answering that question, counsel for defendant, Illinois Central Railroad Company, was permitted to question her as to the source of her knowledge before permitting her to answer.

By Mr. Gentry: *

Q. You were about to tell us in answer to a question, who did he work for. Now, from whom did you learn the fact, from your husband, or from whom did you learn it?

A. From my husband.

Q. From what he told you?

A. Yes sir.

By Mr. Gentry: Then, Your Honor, I submit that is hearsay.

By Mr. Edwards: Let me ask a few questions.

Direct examination (Resumed).

By Mr. Edwards:

Q. Your husband was paid, wasn't he?

A. Yes sir.

Q. Was he paid by check?

A. Yes sir.

Q. Did you ever see those checks?

By Mr. Gentry: I have the checks here if you would like to see them, Mr. Edwards.

By Mr. Edwards: Well, I would like to see them.

By Mr. Hart: But it doesn't cover the twenty-five years.

By Mr. Gentry: It covers the time when he was killed. I have them for several months. I can give you a little more accurately about it. Some are photostatic copies, and the original checks are there.

By Mr. Edwards: Very well, I just want the time before he was killed. These are near enough, I guess. Here is December, 1939.

By Mr. Gentry: You want the first period of December, 1939, he was killed on the 21st.

By Mr. Edwards: I guess they are all the same, they appear to be.

Q. I will show you a cancelled check that Mr. Gentry has furnished me with, dated December 15th, 1939, pay-

able to L. E. Haney, take a look at that, and take a look [fol. 82] at the back and see if that is your husband's signature on the back—is that Mr. Haney's signature?

A. No sir; that is mine.

Q. It is yours?

A. Yes sir.

Q. Did you sign his checks sometimes, and cash them?

A. I did, yes.

Q. Well, I guess that is his check though, it is his salary.

A. Oh, yes sir.

By Mr. Gentry: Have them marked as an exhibit, so that we can identify them, Mr. Edwards.

By Mr. Edwards: Sure, I will do that. I was trying to get the amounts. I suppose we can just mark them.

By Mr. Gentry: By the dates.

(At this point exhibits were marked by the Reporter for the purpose of identification, as "Plaintiff's Exhibit 6, R. W. C. 3/1/44", "Plaintiff's Exhibit 6-1, R. W. C. 3/1/44", and "Plaintiff's Exhibit 6-2, R. W. C. 3/1/44".)

By Mr. Edwards: Now, I will show you what has been identified in the cancelled checks that I have described as Plaintiff's Exhibits 6, 6-1 and 6-2. Look at all three of those, and tell us if those were checks in payment of Mr. Haney's salary?

A. Yes sir.

Q. They all are, aren't they?

A. Yes sir.

Q. Now, I call your attention, when you looked at those checks, "Countersigned Illinois Central Railroad," do you see that on them?

By Mr. Gentry: I object to that because the checks speak for themselves.

By Mr. Edwards: You offered them.

By Mr. Gentry: I did not. I loaned them to you.

By Mr. Edwards: You suggested that I take your checks, and I have them, and then I want to call her attention and ask her if she noticed that before.

By Mr. Gentry: I submit the checks speak for themselves. [fol. 83] By Mr. Edwards: You will admit that all of the checks are countersigned by the Illinois Central, and signed by the name of George Sine—S-i-n-e, it looks like?

By Mr. Gentry: I can't make out that name.

By Mr. Edwards: Well, isn't that true, all of them?

By Mr. Gentry: No sir; I think the counter-signing refers to the treasurer. That brings up an argument.

By Mr. Edwards: I don't see why, because over on the sign you have "Illinois Central," and countersigned by the Illinois Central; and up in the corner of the check, Your Honor, I call your attention again, "Illinois Central."

By Mr. Gentry: Why don't you call the attention of the witness to the other railroad there?

By Mr. Edwards: Yes sir; certainly you have several railroads on there.

By Mr. Gentry: All of that will come up as a question of argument before the Court at the proper time. I object to her testifying what is on the check. It is a matter to be submitted to the Jury and the Court.

By the Court: The checks speak for themselves.

By Mr. Edwards: I think I still have a right to show the countersigning on the side and on the check, to show who her husband worked for.

By Mr. Gentry: It is a question for the Court and Jury to determine, and not for her.

By Mr. Edwards: I asked her who her husband worked for, and you have been objecting to it, and then you produce these checks, and I took the checks and showed them to her. They are countersigned by the Illinois Central, and I insist on this.

By Mr. Gentry: The attorney asked this lady if he was paid by the defendant, and I have the checks—I said "I have the checks here". And then Mr. Edwards took the checks and submitted them to her. His statement is argumentative and should not be made in the presence of the Jury.

[fol. 84] By Mr. Edwards: That is what I say, and it is true, isn't it, the Illinois Central Railroad?

By Mr. Gentry: Which is one of the things on this, Y. M. V. Ry.

By Mr. Edwards: And doesn't it show right here "Countersigned: Illinois Central. Mr. Lines"?

By Mr. Gentry: I do not so understand it. Can't you read?

By Mr. Edwards: Yes sir; and I say it is "Connor", treasurer. Now, I insist that this lady may say who her husband worked for.

Mr. Gentry: And I object because it is hearsay.
By the Court: Overruled.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time and still continue to except.

By Mr. Edwards: Who do you say he worked for?
A. My husband told me he worked for the I. C.

By Mr. Gentry: I object to that, and ask that it be stricken. It was a definite statement that her husband told her certain things.

By Mr. Edwards: I have a right to show whether she went down to where he worked, whether he had an insignia on him. He can't shut her off so she can't testify to anything.

By Mr. Gentry: But I can make a motion and ask the Court to rule on my motion. I move to strike out the statement what he told her.

By Mr. Edwards: I say the motion is improper in view of the fact that Counsel has not permitted me to question the witness whether she knows who her husband worked for.

By the Court: It may be stricken, what her husband told her.

[fol. 85] By Mr. Gentry: And will Your Honor instruct the Jury to disregard that?

By the Court: Yes sir; you may disregard that.

By Mr. Edwards: Did your husband wear any insignia of any kind when he went to work?

A. Well, he had a little button.

Q. And what did the button say on it?

A. I think it was the lodge he belonged to.

Q. Did it show any name, or anything?

A. I thought it had YMV on it.

Q. Did he have any button that he wore on his coat?

A. Yes sir.

Q. What was that?

A. That was the same little button.

Q. Now, did you ever go down with him to work, where he reported?

A. I have been with him, yes sir, down there.

Q. And where did he report to work?

A. He reported—you mean where he worked?

Q. Yes.

A. At that little shanty down there between Florida and Main.

Q. And do you know what it was, what kind of a shanty it was?

A. Oh, it was just a little bit of a place, not enough to turn around good with a desk and chair in it.

Q. I guess like the other shanties along there at the crossing.

A. Yes sir.

Q. And what kind of work did he do?

A. He threw switches.

Q. And what did they call him?

A. A switch tender.

Q. A switch tender?

A. Yes sir.

Q. How long had he worked at that job?

A. Well, I just don't know exactly.

Q. Oh, give the Jury just about what you figure.

A. Well, off and on he has worked for the railroad for about twenty-five years.

Q. Did he work for the same railroad?

A. Yes, sir.

[fol. 86] Q. Did he have the same duties, switch tender, all that time?

A. No, sir; he had been a switchman.

Q. Who did he work for as switchman?

A. The same ones.

By Mr. Gentry: That brings up the same question again, her opinion or conclusion as to who he worked for. She answered before I could object, and I do object to it and ask it be stricken.

By Mr. Edwards: Your Honor, I will do this. Mr. Gentry furnished me with those checks. I will offer them in evidence.

By Mr. Gentry: I have no objection to offering them in evidence.

By Mr. Edwards: I will offer them all in evidence. I haven't asked her to look over them. (To witness) Will you look over these checks, each one of them, and see if they are in payment of Mr. Haney's wages, so we will know they are all checks and we can then offer them.

(Witness examines checks.)

By Mr. Edwards:

Q. Now, you have examined all of these canceled checks, payable to L. E. Haney, running from some time in July to December, 1939. I don't know whether they are all of the checks he received or not, but all of these checks were checks payable to Mr. Haney for his salary, were they not?

A. Yes, sir.

Q. You looked at each and every one of them?

A. Yes, sir.

By Mr. Edwards: I offer them all in evidence, Your Honor please, and let them be identified as Plaintiff's Exhibits 6-1, 6-2, 6-3, and so forth.

By the Court: Very well.

(Which said exhibit was therefore so marked by the reporter.)

By Mr. Edwards:

Q. Now, I call your attention to the fact that these checks [fol. 87] outside of one in December, 1939, and one in July, 1939, they are all for \$70.00 or more. I want to get his average wage if I can.

By Mr. Gentry: Well, write them all down and divide it by the number of checks, and you have it.

By Mr. Edwards: I call your attention to the checks payable to Mr. Haney from the first of July to his death in December. I have five checks here for \$77.26. I have one check for \$85.00, August 31st, 1939—\$85.14; one check dated September 15th, 1939, for \$71.86, and I have three checks for \$79.78. Now, I will ask you what do you think Mr. Haney averaged in the payment of his checks?

By Mr. Gentry: Well, if Your Honor please, I submit that would be only an estimate or a guess on the part of the witness. The true evidence is there in the checks themselves. He can add them all together and divide that by the number of checks and tell us mathematically.

By Mr. Edwards: I submit these last two checks, the one after his death is only for a part-time payment.

By Mr. Gentry: Well, of course, he was killed before the period was out.

By Mr. Edwards: They did not pay him for the full half month, apparently only paid him up to the time he was killed.

By Mr. Gentry: Well, his employment ceased.

By Mr. Edwards: What I want, is to get her idea of an average of what he earned.

By Mr. Gentry: I object to that if Your Honor please, because the facts are before the jury.

By Mr. Edwards: We don't have all of the checks on that for this period.

By Mr. Gentry: I think you have, you haven't got them in order, but you have sorted them out according to amounts. I think they are all there.

By Mr. Edwards: There are two here, one in September—no, in July, \$42.47, and the one apparently that was given [fol. 88] after his death, for \$31.00. Now, all of the rest of them are for more than \$70.00, and five of them for \$77.78, one of them is for \$85.00, and one is for \$71.86. I will ask you what was the average earning per month, if you can give us that?

By Mr. Gentry: In that time you mentioned?

By Mr. Edwards: Well, say over a year before he died, that is fair enough.

By Mr. Gentry: Well, if the witness knows.

By Mr. Edwards: Yes, sir; if the witness knows. A year before he died, what was *his* average of his salary—what would you say he averaged in his salary, earning, what was he being paid the year before he died?

By the Court: If you know.

By the Witness: Around \$165.00 or \$170.00 a month.

Q. Around \$165.00 or \$170.00 a month?

A. That is according to what they taken out on different things.

Q. Now, these cancelled checks here, I understand these cancelled checks are the net amounts—they have already taken out what they were going to take out.

By Mr. Gentry: That is a fact I don't really know, Mr. Edwards.

By Mr. Edwards: They surely did, they wouldn't have him paying it back. In other words, these checks are the net amount paid to him, and whatever is to be taken out, has been taken out.

By Mr. Gentry: I think that must be true, and we will treat it on that basis.

By Mr. Edwards: (To witness) What did you say you think he earned a month?

A. Around \$165.00 or \$170.00 a month.

By Mr. Gentry: I do not understand from the witness whether it was after the deductions, or whether that was the gross.

By Mr. Edwards:

Q. Was that after the deductions?

A. These checks here are after everything is taken out.

[fol. 89] By Mr. Gentry:

Q. Well, is that figure you are giving before things were taken out?

A. No, sir; that is around what he makes without taking it out—I mean, after it was taken out.

By Mr. Edwards:

Q. After it was taken out?

A. Yes, sir.

Q. He would average the amount you have given a month?

A. Yes, sir; after everything was taken out.

By Mr. Edwards: I offer these checks in evidence, Your Honor.

By the Court: Very well, that may be done.

(Clerk here inserts Exhibits 6, 6-1, 6-2, 6-3, 6-4, etc.)

By Mr. Edwards:

Q. Now, both of your children, I believe, were 21 years old at the time Mr. Haney was killed, weren't they?

A. Yes, sir.

Q. Your daughter was 22 then, wasn't she?

A. No, sir; she was 21.

Q. But she was married?

A. Yes, sir.

Q. Was she living at home?

A. Yes, sir.

Q. Did she pay any board, or what was her arrangement at the time your husband died?

A. Well, her father taken care of her.

Q. You mean Mr. Haney?

A. Yes, sir.

Q. Do you mean you did or did not charge her board?

A. We didn't charge her no board.

Q. You did not charge her any board?

A. No, sir.

Q. Had your husband or you charged your daughter board at any time up to the time your husband was killed?

A. No, sir.

Q. Now, your son was older, and I believe he was married, too?

A. Yes, sir.

Q. Living in his own home?

A. Yes, sir.

Q. He lived there in the neighborhood close, did he not?

A. Yes, sir.

By the Witness: Both of my children were over 21 years old when Mr. Haney was killed. My daughter was 21 then [fol. 90] and was married and living at home. Mr. Haney took care of her. We did not charge her any board at any time up to the time when my husband was killed. My son was married and living in his own home.

We received word of Mr. Haney's death about 9 o'clock on the evening that it happened. My daughter, my son and I then went down to St. Joseph's Hospital in Memphis. Mr. Haney was dead at that time. He appeared to have been injured right back of the head. There were some cinders in his face on the right side.

I did not go into the yards that night, but I did go there the next morning.

At the time of his death Mr. Haney was a well and healthy man, worked regularly, and had always been in good health outside of colds and some minor ailments. Mr. Haney always carried a pistol at night when he went to work, but never carried it when he was not at work,

He was wearing a diamond ring when he was killed and that was still on him at the hospital. The diamond lacked a few points of being a karat. He was also carrying a gold watch that was given to me afterwards. He never carried very much money, not very much more than \$10.

I am 43 years old. My husband was 47 when he was killed. I believe he would have been 48 at his next birthday on the 16th of February.

Cross-examination.

By Mr. Skinner:

I couldn't tell you just exactly how Mr. Haney's pistol looked. He was a right-handed man. He carried the pistol in a scabbard on the right side of his belt, I think. It was the usual thing for him to carry the pistol at night if he worked at night. His pocketbook was just an ordinary billfold with a compartment for cards and things of that sort and a place for bills and money to be put in. The pocketbook was never returned to me but I did get the ring and the watch. I saw the pocketbook after December 21, 1939, at the police station. It was found a week after Mr. Haney's death and we had had snow and rain, but the billfold was not soiled a bit, the rain had not hurt any of the cards or anything like that in it. There were certain cards, social security card and things of that sort in it, but there was no money in it. It was found lying up on a fence at the Crane people's place just a few steps from where they put him in the ambulance, which was on Florida Street.

Cross-examination.

By Mr. Gentry:

The checks dated December 15, 1939, and December 30, 1939, respectively, were endorsed by me after my husband's death. I went up to the office lots of times and got his money.

Every one of the other checks dated respectively July 15th, July 21st, August 15th, August 31st, September 15th, September 30th, October 14th, October 31st, November 15th and November 29th, have but a single endorsement on each of them, and that is the name "L. E. Haney". Every one is his endorsement. They are all in his handwriting.

I never knew that he had heart trouble and had been examined by a physician and had to take extra care of himself for some months before he died. I didn't know of his having any heart trouble at all.

Mr. Haney hardly ever took more than \$20 from his salary for his own expenses. He contributed the rest to our support.

At the time of his death my daughter was married but her husband wasn't supporting her. They were not living together.

[fol. 92] ROBERT J. O'BRIEN, being duly sworn on the part of the plaintiff, testified as follows:

My name is Robert J. O'Brien, I am with an insurance agency and have been in the insurance business 43 years. I have a mortality table on which policies are written. Turning to that mortality table I find that the life expectancy of a man 47 years old is 23.98 years. That of a man 48 years old is 22.36 years.

The life expectancy of a woman 38 years old is 29.62 and the life expectancy of a woman 39 years old is 28.90. Those tables are the American experience table of mortality. All companies use the same table.

ALVIN ARTHUR HANEY, being duly sworn on the part of the plaintiff, testified as follows:

My name is Alvin Arthur Haney, I am 29 years old, my father and mother were Mr. Lyman Haney and Mrs. Julia Haney. I am now in the United States Army, stationed at Camp Van Dorn, Miss., with an anti-tank outfit known as the 254th Infantry.

At the time of my father's death I had a little candy store in Memphis and that was one block from where my mother and father lived.

On the evening of my father's death, my mother came down there and told me and I went with her to St. Joseph Hospital and saw my father there. He was dead when I saw him. I didn't look at the wound on the back of his head. His face had cinders ground into the right side of it. Later that evening I went to the Frisco switch that has been mentioned in the testimony here. They threwed a light down there and I seen what I thought was blood, whether it was or not I couldn't tell then because it was [fol. 93] too dark. But the next morning I went back. From what they showed me I will say there was a spot of blood from six to eight inches across. It was east of the switch and north of the Frisco tracks. I would say it was between

three and four foot north of the north rail of the Frisco track and around six or eight foot east of that switch. At the place where I saw that blood the ground was higher than the north rail of the Frisco tracks. I would say to the best of my knowledge it was about eighteen inches or two feet higher. There were cinders on the ground north of the track. There was another track farther north than the Frisco track and I would say it was around fifteen feet between the two, as far as I know. I couldn't say for sure. The height of the space between that track and the Frisco track varied in different places.

I worked with my father the Christmas before his death. As far as I know, I thought I was working for the I. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid as far as I remember the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind while I was there. As far as I remember, I thought it had "Illinois Central" across the top of it "Railroad Brothers, Trainmen" or something. He wore that on his cap while he was working. I just worked there through the Christmas holidays. I think it was 1938, the year before my father was killed. I loaded mail in and off the trains and sorted mail packages for different companies. Christmas presents and things like that. I was there when [fol. 94] trains would back into the station. My hours were from 3:30 in the afternoon until 11 o'clock at night.

Q. Now what was the custom of those cars, when they backed in there, those passenger cars and those mail cars and express cars, whether or not the side doors would be open or closed?

By Mr. Gentry: I object to that. What they may have done on other occasions, don't prove it was done on the occasion of this man's death. The mere fact somebody might have opened the door sometime doesn't prove anything in this case.

By Mr. Edwards: That is the very thing that I claimed yesterday when I objected to trying to show there was certain things, and they said it was competent evidence, and Mr. Drashman said in all his forty years he had never seen one that was open, and he was working there at the time this man was working there. It was for two purposes, and I think it is competent for that reason.

By Mr. Gentry: He hasn't stated all that was said by Mr. Drashman on that subject, when they got up there close to the station they opened the doors.

By Mr. Edwards: He said they kept the doors closed until they backed all of the way in, and he had *had* never known a door to be open in 40 years. I think I can show it in view of that fact.

By the Court: The witness may answer.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted and continued to except.

By the Witness: I have seen them open, and back from quite a distance back. I have seen them standing open, stacked full of mail, and the doors looked like they would hardly close, they had so much mail and packages. As far as I know, the mail cars and express cars both look the same to me. I did not unload any of them. I put mail and stuff on them.

[fol. 95] I don't remember the exact distance between the station and the ends of the platforms back there where they come in, but I have seen them come that distance with the doors open. That was usually the custom as long as I was there.

My father was about 5 feet 7½ inches tall.

Cross-examination.

By Mr. Gentry:

The platform I spoke of is a platform where we sorted the mail. The platform is south of the station, quite a distance. It seems to me like it is right behind where the people start getting off. The platform extends out south of that point, I should say around 100 or 150 feet. The trains that I saw with the doors of the express cars and

mail cars open had them opened about opposite that platform.

I couldn't be positive about what was on the buttons that my father wore.

Redirect examination.

By Mr. Edwards:

From the point where I saw the spot of blood, the next morning, after my father's death, back towards the switch, the ground was different all along there. It is just where they threw the dirt up. In some places the dirt was higher and in some it was lower.

From that Frisco switch, it is about 250 feet down to Florida Street. The switch was between Florida Street and Main Street. There is no streets between there between the railroads. At that switch there is no place for vehicles to drive over. It is just right of way and railroad tracks there.

My father did not wear glasses. His eyesight was good as far as I know. He did not have any enemies that I know of. He was not in the habit of carrying large sums of money as far as I know.

[fol. 96] C. BRUCE FARMER, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Edwards.

My name is C. Bruce Farmer. I live in Kirkwood, Missouri. I am a railway postal clerk. I sort and distribute mail on the moving railway postal cars. I run on the Burlington between St. Louis and Burlington, Iowa. I have been running on the railroad as a railway mail clerk since 1925; however, I have been in the mail service over thirty years.

You called me last night and at your request I made some measurements of mail pouch hooks on trains.

These are what are known as traveling railway post offices. These cars on which hooks are fastened are various lengths. Mail cars are either 15 feet, 30 feet or 60

feet. However, the overall length of a car might be 60 or 70 feet, and there would be a partition for 15 feet of the mail car space, or 30 feet. Or another car of 60 feet might be used for mail purposes, and each one of these cars has at least two doors, one on either side. And on each door there is what we call a catcher arm. The purpose of this catcher arm is to catch mail off of a crane that is placed at various stations, while the train is in motion. These catcher arms are fastened in the doorway; about halfway up the doorway on either side there is a steel rod that runs across the door, and these arms are fastened on that, so they work on a fulcrum and when not in use they hang down against the sides of the car, and when they are in the used position they are horizontal. They can swing out from the side of the car, not to exceed a foot; I never saw one that did.

They are not fastened at any place except where they are fastened in the doorway. The measurements I took this morning were from the top of the ties to the lower [fol. 97] end of the catcher arm. The average rail would be 7 or 8 inches high, not to exceed 8 inches. The first car I measured was a Frisco car and it was 80 inches from the bottom of this catcher arm to the top of the ties. That was a 30-foot car. When the door was closed, the catcher arm could swing out a little ways, and when it swung the full distance you could swing it out it was 87 inches from the bottom of the catcher arm to the top of the ties. With the car door open it would have been 9 feet from the top of the ties.

I measured another Frisco Car, No. 205, and it was 80 inches from the top of the ties to the lower end of the mail catcher. That also was a 30-foot car. Then I measured a B. & O. 60-foot car, No. 70, and the distance was 68 inches. That was a 60-foot car. I measured a Wabash 60-foot car, No. 179, and that was 70 inches, from the end of the catcher arm to the top of the ties. All of these measurements are from the top of the ties up to the bottom of the iron hanging down. I measured a New York Central car, a 30-foot car, and it was 80 inches. I measured a Nickel Plate 15-foot car and it was 76 inches. Then I measured a Burlington car, a 60-foot car, and it was 78 inches. Those are all the cars I measured. In all my experience I have seen the catcher arms swing out a slight distance, as far as a foot. If the door is open they

can swing out as far as 26 inches to 3 feet, but they won't swing out unless somebody pulls them up; somebody has got hold of the handle and pulls them up. They won't swing more than 12 inches without that; it pivots, just from the sway of the train. They won't swing any farther with the door open. With the door open they can be pulled up, as we term it, so the end will be about nine feet above the top of the ties, but some person has to pull them up for them to do that.

[fol. 98] Cross-examination.

By Mr. Skinker:

I spoke of the distance of 80 inches, which of course is 6 feet and 8 inches, from the top of the ties to the bottom of the mail catcher arm. That seemed to be the standard height or distance from the bottom of the catcher arm above the tie on the Frisco cars. Seven inches is the height of the average rail above the tie. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock. In coming into the Union Station at St. Louis, nearly all of the trains pull up and back around a curve with the back end going into the station first. I have seen that done hundreds of times. The train is supposed to be under control at all times, but I would say ten miles is as fast as they are supposed to come in. They have the conductor on the back end with the air. In backing in at a speed of ten miles an hour or less, over a switch if the track was smooth that would not throw the mail catcher out from the bottom of the car at all, but if the track was wavy, it might. It might come out a little distance from the bottom, but ordinarily not as much as a foot from the side of the car, and I have never seen it go out more than a foot under those circumstances, but the side of the car stands out over the edge of the ties about 8 to 10 inches—the overhang. These mail pouch catchers are called catcher arms. They form what you might call a V, so as to catch the mail pouch when extended out. The top of the mail pouch comes into the V of the catcher arm and you pick it up and run on. The catcher arm is always fixed so that the V, or open part, is in the direction in

which the train is going, and that is the way you operate them. So when a train was backing into the station, the closed part of the V arm would be moving forward and the [fol. 99] open part would be towards the engine. The mail cars are usually carried right behind the engine. A photograph of a mail catcher arm is now identified as Defendant's Exhibit C, and another as Defendant's Exhibit D. The photograph you now hand me, marked "Defendant's Exhibit C," represents the catcher arm of a mail car in ordinary position, the type of arm I have described to the jury. That is a fair and reasonable picture of a catcher arm, showing its construction and the way it is placed on the mail car. It looks like those I inspected and the ones I have on my cars. I point out the knob on the end of the catcher arm. It is possible to catch a pouch in there, and I have done it, when the catcher arm was not in proper position. Ordinarily it is through the V groove, but the knob is on the end either way you go. That knob is the lowest part of the arm and this door is open. The distance of 80 inches from the top of the rail up to the lower part of the catcher arm is as shown there, and that is 6 feet and 8 inches. If the mail clerk catches the handle at the top and pulls down on it, that raises the catcher arm to this height, and that is the usual distance when catching a pouch and that would make it stand out horizontal. To keep it there, the operator would have to hold the handle down inside the car and this is the place where the pouch ends up, the circle at the bottom of the V.

Defendant's Exhibit D is a fair representation of a mail catcher arm extended out at the extreme distance like it would be when the operator catches mail. There is a white scale above that which shows that from the side of the mail car out to the extreme end there is 30 inches. The mail catcher arm itself is about $26\frac{1}{2}$ inches, but the bracket takes up $3\frac{1}{2}$ to 4 inches and the total makes an extreme extension of about 30 inches. Undoubtedly that is correct. I would say that when it is done that way, that is approximately nine feet above the top of the tie.

[fol. 100] Redirect examination:

By Mr. Edwards:

All of these catcher arms are fastened to the train very solid. However, they can be slipped out of this bracket

and turned around, but that part must be solid because catches are made sometimes with trains doing in excess of 80 miles an hour, and they have to be very solid to withstand an awful lot of pressure.

This bottom of the catcher arm, as I have pointed out, is round, and is about three inches in diameter. I mean that knob down on the extreme end. It is made of steel. All I ever saw were the same shape on the end. I never saw one of them that was pointed, because if they were pointed you might run them through a mail pouch. I never saw an arm bent except when it hit a bridge or a box car of some sort.

Cross-examination.

By Mr. Gentry:

The end of the catcher arm which I have designated as a knob, is more correctly designated as a loop. It is round, but it is like a ring, and curved up so it won't run through a catcher pouch. I have never measured the exact length of a catcher arm.

Recross-examination.

By Mr. Skinker:

The upper part is a handle and part of it is made out of wood; about one-half is metal and the rest of it is wood. The entire catcher arm is outside of the door and when the door is closed it cannot be operated. The handle is, of course, above the horizontal bracket across the door.

Redirect examination.

By Mr. Edwards.

The orders are to keep the doors closed at all times except when you stop. However, the boys deviate once in awhile and in hot weather run with the doors open at times. In cold weather we run with them open when we have to keep them open. In the St. Louis yards at the lower end of the train sheds, pouches which have only a few [fol. 101] minutes for connections are dispatched at that point, and there is always a man to get them so he can convey them to different trains, whatever trains they are going

on. So there are times with a six or eight or ten minutes connection when we open the door to do that. We may open the door when the train is backing about six or eight car lengths from where the mail pouches are put off.

Recross-examination.

By Mr. Gentry:

There is a crane inside of the track and there is a catcher pouch on that crane and it is tied in the middle. It has a strap around the middle of it and the catcher arm comes along and catches it in the middle and takes it into the car.

MARJORIE HANEY LINSOM, being duly sworn on the part of the plaintiff, testified as follows:

My name is Marjorie Haney Linsom. I was married on April 13, 1936. I now live at 3172 Tutweiler Avenue, Memphis, with my husband.

Elmer Lyman Haney was my father and Mrs. Julia Haney is my mother and Alvin is my brother. That is all of the family.

At the time of my father's death, my husband wasn't working and I lived at home and he lived at his home. After my father's death, I went with my husband and he has a position and we are living now at the address I have given.

I have seen my father wear a button when he worked. It was a round button, and it has "Illinois Central" or "I. C. Railroad" on it. It was just the initials I. C. R. R. He wore the button on his cap. He had a railroad pass and on that was "The Illinois Central." He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time.

I have been down to where my father worked, and I [fol. 102] know the shanty where his headquarters were, which my mother described.

I have been with my mother to the Illinois Central station to get my father's checks. To the best of my knowledge we got them just inside the station, right where you buy tickets, in one of those places there, near that. We

got checks similar to those you had here this morning. They were just checks that could fit in a billfold. It was thinner than a card, more like paper.

My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road, we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had "Illinois Central" on it and it was issued to Lyman E. Haney, employee.

Cross-examination.

By Mr. Skinker:

At the time of my father's death I was 21 years old and married and had been married three years.

Cross-examination.

By Mr. Gentry:

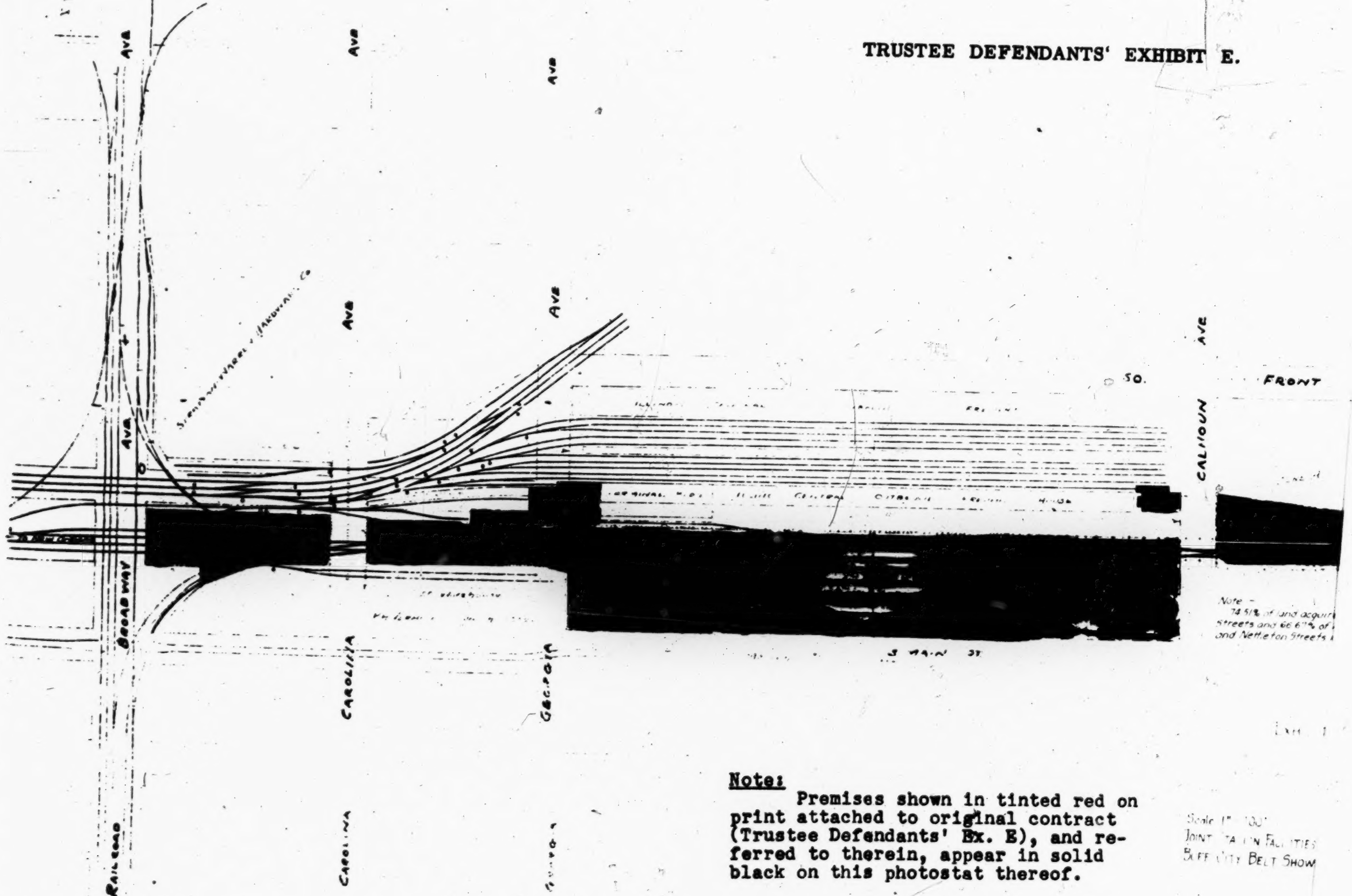
I believe the pass that I speak of had the name "Illinois Central System" on it. I didn't see that it had Y&MV on it also.

I never saw a button that my father wore on his coat or vest. The one on his cap had "Brotherhood of Trainmen" on it. It did not have "I. C. System" on it. It did not have "Y&MV" on it. It had I. C. R. R. Brotherhood of Trainmen.

By Mr. Edwards: Now if Your Honor please, I think I have offered all my exhibits. I will again offer them and pass them to the jury so they can look at them. I will offer the cancelled checks referred to and described as Plaintiffs Exhibits 6, 6-1, 6-2, and so, and then also Plaintiff's Exhibit 3, which is the hospital record, and Plaintiff's Exhibit 4, and Exhibit 4-a.

(Here follows 1 photolithograph side folio 102a)

TRUSTEE DEFENDANTS' EXHIBIT E.



Note:

Premises shown in tinted red on print attached to original contract (Trustee Defendants' Ex. E), and referred to therein, appear in solid black on this photostat thereof.

Scale 1" = 100'
JOINT TAILOR FACILITIES
BUFF CITY BELT SHOW

TRUSTEE DEFENDANTS' EXHIBIT E.

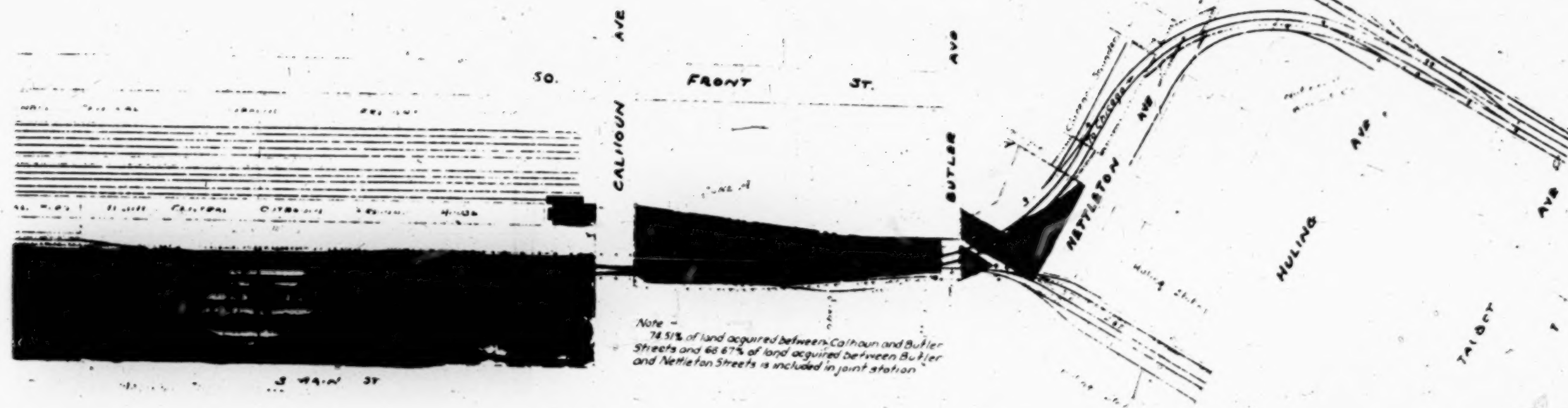


EXHIBIT A

Note:

Premises shown in tinted red on print attached to original contract (Trustee Defendants' Ex. E), and referred to therein, appear in solid black on this photostat thereof.

Scale 1" = 100'
Nov 16, 1914
JOINT STATION FACILITIES AND LAND SHOWN IN RED
BUFF CITY BELT SHOWN IN YELLOW

[fol. 103]

PLAINTIFF'S EXHIBIT 5

Mr. N. Murry Edwards, Attorney,
112 North Fourth Street,
St. Louis, Missouri.

In the trial of the above case in the Circuit Court of the City of St. Louis, Missouri, it will be admitted by the defendants J. M. Kurn and John G. Lonsdale, Trustees of Frisco Company, as follows:

1. That Frisco passenger train No. 106, which arrived at the Grand Central Station at Memphis, Tennessee, on the evening of December 21, 1939, commenced its run at Birmingham, Alabama, and was an interstate train.

2. That plaintiff's photostatic copy of the hospital record of St. Joseph Hospital, Memphis, Tennessee, dated 12/21/39, in connection with the death of Lyman Haney is a correct copy of the original of said hospital record kept in the regular course of the Hospital's business, and may be used in the trial of the above case for all purposes for which said original records might be used.

3. That on and prior to December 21, 1939, Lyman Elmer Haney was employed by the Illinois Central Railroad Company or a subsidiary corporation thereof known as the Y. & M. V. Railroad Co., as a switch tender in the railroad yards near the Grand Central Station at Memphis, Tennessee; that his duties included the throwing of switches for said railroads, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to, and did, reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages.

4. That a written agreement dated the 27th day of March, 1934, by and between the Illinois Central Railroad [fol. 104] Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, with print thereto attached marked "Exhibit A", together with letter dated May 23, 1934, from W. Atwill, V. P. & G. M. of Illinois Central System to H. L. Worman, Chief Operating Officer, St. Louis-San Francisco Railway Company, St. Louis, Missouri, and letter dated May 28,

1934, from H. L. Worman, Chief Operating Officer for Frisco Trustees, to W. Atwill, V. P. & G. M., Illinois Central System, Chicago, Illinois, were in full force and effect on December 21, 1939, and had been since the dates thereof; and that plaintiff's photostatic copies thereof are true and correct copies of the original documents in the office of the Secretary for the Trustees of the Frisco Railroad. Said Trustees, however, deny that the documents referred to in this paragraph apply to the employment of said Lyman Elmer Haney, and deny that said documents apply to or include the location or portion of said railroad yards where said Lyman Elmer Haney received his fatal injuries.

Yours truly, C. H. Skinker, Jr., Attorney for Defendants, Kurn and Lonsdale.

(Here follows 1 photolithograph, side folios 105-106)

(Front)

W. C. Connelly
TREASURER

Two-Step: 99224

[fol. 107] By Mr. Edwards: The plaintiff rests, Your Honor.

And thereupon, at the close of the evidence offered by the plaintiff, the defendants J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Company, Debtor, asked the court to give to the jury the following instruction in the nature of a demurrer to said evidence so offered by plaintiff:

MOTIONS FOR DIRECTED VERDICT

"Now at the close of all the evidence on the part of plaintiff the Court instructs the jury that under the law and the evidence plaintiff is not entitled to recover against the defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, and your verdict must be for said defendants."

Which said instruction, so asked by said defendants, was, by the Court refused; and to which action of the Court in refusing to give to the jury said instruction in the nature of a demurrer to the evidence, offered on the part of the plaintiff, the defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, by counsel, then and there duly excepted at the time and still continue to except.

And thereupon, at the close of all the evidence offered by the plaintiff, the defendant, Illinois Central Railroad Company, a corporation, asked the Court to give to the jury the following instruction in the nature of a demurrer to the said evidence so offered by plaintiff:

"At the close of all the evidence offered by the plaintiff the Court instructs the jury that under the pleadings and the evidence the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant."

Which said instruction as asked by said defendant was, by the Court, refused; and to which action of the Court [fol. 108] in refusing to give to the jury said instruction in the nature of a demurrer to the evidence, offered on the part of plaintiff, the defendant, Illinois Central Railroad Company, a corporation, by counsel, then and there duly excepted at the time and still continues to except.

DEFENDANTS' EVIDENCE

CLAUDE JOSEPH BRUSO, being duly sworn, on the part of the defendants testified as follows:

My name is Claude Joseph Brusco. I reside in Memphis, Tennessee; am a yard conductor for Illinois Central Railroad Company, and have worked for that company continuously thirty years. All of that work has been in the yards in and around Memphis.

I knew Mr. Lyman Haney in his lifetime. I was on duty on the evening of December 21, 1939, and I was connected with job No. 152, what they call a bum engine. That was doing switching work, transfer work of freight cars for the Illinois Central. I was conductor in charge of that switch engine, and I had a switching crew under me of an engineer and a fireman, a foreman and helpers. I am familiar with the crossover of the Illinois Central tracks and the Frisco tracks at the location which has been described in this case. The main line of the Illinois Central there runs north and south, the Frisco runs east and west and they cross at right angles near where Mr. Haney's shanty was. As we came up there that evening my engine was headed north and when it got to the crossover it stopped; the board was red; it was against us. That board was controlled by Mr. Haney from the shanty where he worked. My engine stopped south of the Frisco tracks. I had no right to proceed until I got what was called a green board. I reached there right around 7:15 [fol. 109] in the evening I imagine. I was riding on the front footboard of my northbound engine. When it stopped there I got off of the footboard and walked across the tracks to the yard office at Carolina Street. I walked north up the Illinois Central track about one block from Broadway to Carolina Street. That block was about 300 feet along, I imagine. I stayed up there until right around 7:30. I did not come back to my engine until after the Frisco train 106 backed into the depot. That was while I was up at Carolina Street. I was then under the impression that Mr. Haney would then give us the green board, and as my crew came to me I would catch them at Carolina Street and then go over there to make the Mo. Pac. delivery I had hold of. The green light did not come on and after some little bit a Mo. Pac. passenger train went west, a motor car on the Mo. Pac. went east.

After those two trains passed all of us were still standing on the other side of the crossing.

Then I walked on down toward Mr. Haney's shanty and as the Mo. Pac. cut was pulled by, I walked up to his shanty and the door was locked. The light was still red against my engine and against all Illinois Central trains going north or south over that crossing. I stood there for a minute or so and I looked west in the direction of this switch at the wye where the Frisco train backs in. I saw that the wye switch was still red, the light on it was still red. That meant it was lined for the depot as the train backed in, just the same as it was when the Frisco passenger train backed in, and not lined for the main line. If it was for the main line it would show green. After I saw that this switch was red, and then for the length of time it had been red, I knew there was something wrong, because it is customary to line up that switch and for him to come back to his shanty to maintain the board that governs the crossings; then I walked up there in the vicinity of that switch. When I got up there I found Mr. Haney laying on the ground. The switch is about 250 or 300 feet west of the shanty. Haney was lying [fol. 110] face down with the right side of his face on the ground, he was lying north and south from the track; in other words, he was straight north and south and the track was east and west and he was lying on his stomach, face down, with the right side of his face down. His feet and his body were directly back of him. He was 14 feet west of the switch stand. Next morning that distance was measured by Mr. Gleason, who is head of the detective department, police department, the homicide squad in Memphis, and Mr. Ben Owens. He was a sergeant of detectives in the homicide squad at that time. They had me report to their office the next morning at 8 o'clock, and they took us down there to the switch stand. At the point where Haney's head was lying, there was a small pool of blood right at his mouth and about, or maybe not quite, a half quart lying right by the side of him. His head was 5 feet and 9 inches from the north rail of the Frisco track. We determined that by actual measurement the next morning. There was a small mark there five or six inches long, I would say where his toes drag towards the track, and I could see those dragging marks. It was practically soft dirt there. There was a small space where his toes had drag as the weight of his body, where he fell forward. I imagine those marks were

12 or 13 feet north of the north rail of the Frisco track. They appeared to be about the length of his body back from his head, as though he had slipped forward. I was the first one to him. There was nobody else around there that I could see anywhere at that time. I turned around and went back to the crossing, just the other side of Mr. Haney's shanty, east of where Mr. Haney was laying, and Mr. Bundy and Mr. Sam Arnold were there, and I called to them and told them that Haney had been hurt, and to have Sam to call the ambulance, and Bundy came with me and we went back to Mr. Haney's body. When we got back to his body there was nobody else there at the time; we two were alone [fol. 111] with him. We raised up Mr. Haney's body and turned him over. When we raised him his left hand was at his chest with his lantern in it. His right hand was on the lower part of his stomach, with his pistol laying in his hand loose. His hand was open and his pistol in it. We turned him around to the northwest so that his head would be at the side of the mound. After we raised him up and found what we did find there, Mr. Pattison came walking across the tracks from the south. He is night yard master for the Mo. Pac. Railroad. He came up there and I said, "Pat, you and Bundy stay here, and I will go down to the shanty and knock the glass out of the door and give the board to No. 4." That was the Illinois Central passenger—so they could enter the station. I broke the glass out, ran my hand through and turned the switch to give the green board to the Illinois Central tracks north and south, put the red board on the Frisco tracks east and west. As I did, the engineer of my crew whistled off and started with No. 4. I had 25 cars in the delivery I was going to make to the Mo. Pac. and when my men started off, I had to go with them because we had more cars than the two men could pass signals to, to make that Mo. Pac. delivery at Calhoun St. I left Mr. Haney back at the scene of the accident with Bundy and Mr. Pattison, and I went on with my crew. Mr. Haney was not conscious, he was breathing but he was not conscious. I did not hear him utter a word at any time.

I was back at the scene of the accident the next morning at the request of the homicide squad of the Memphis police. They had me to report to the office at the police station at 8 o'clock and then I went with them in an automobile from the police department down Caroline St. at the corner of Main. Only Mr. Owens and Mr. Gleason went with me. Mr.

Owens is the detective-sergeant and Mr. Gleason the Captain. They had me to show them where Haney had been lying and the marks and things and the condition the body was in when we found it. Some photographs were made [fol. 112] while we were down there that morning and I was present. The photograph which you now hand me which has been marked by the reporter as Defendant Frisco Trustees' Exhibit A and which purports to have been taken on the morning of Dec. 22, 1939, 11:15 A. M., was made looking east, the camera located 100 feet west of Frisco west wye main line switch. I recognize that as a photograph taken on that occasion and I myself am shown in the photograph, looking west, but the camera is looking east. They had me to stand at that particular spot as that was the spot where the blood from Haney's mouth was and that is where I identified it to the police and where I saw it the night before and it was still there that morning and they had me stand with the spot between my feet and I was facing west.

Defendant Frisco Trustees' Exhibit B is a photograph taken at the same time and place, made looking northeast, the camera located 18 feet southwest of the point where Haney's head lay. That is a closeup view of the switch stand and the territory immediately surrounding it as it appeared there that morning after the accident. That photograph was made while I was present. In that photograph is shown a white pencil inserted in the ground the white pencil nearest the track and that is the spot where the spot of blood was from Haney's mouth. That is the spot where I had my feet in the other photograph. To the north of that another pencil is shown in the photograph. That represents where Haney's feet were after the sliding had been completed. The distance from the track back to where his toes were was 12 or 13 feet. That was very close to a telephone pole immediately north of where the dragging of his feet was. From the Frisco track over to that north track, which is a joint track of the N. C. & St. L. and the Rock Island, was about 37 feet.

[fol. 113] Cross-examination.

By Mr. Edwards:

I got Haney's pistol; Mr. Bundy told me to take the pistol and put it in my pocket, which I did. I gave it to Mr. Berry, special agent, Illinois Central Railroad.

The claim agents of the railroad were there the next morning when the pictures were taken. I didn't make any mark the night before that where I found Haney, because I was never back there any more after I found him. I was there only just a few minutes that night, when I found his body, not any more than 3 or 4 minutes or 5 anyhow, and it was dark around there. I did not see the tracks that night, but I saw them the next morning. When I left there that night Mr. Pattison and Mr. Bundy were there. I don't know anything about how they carried his body away. I made the Mo. Pac. delivery while they were doing all of that. I saw the claim agents for the first time in Mr. Gleason's office and in Mr. Owen's office that morning. The claim agents did not send for me to come down there. I was supposed to be down there at eight o'clock. The claim agents came in while I was there. I was in the office of the chief of detectives and made a statement to the detectives. I did not exactly refuse to give Mrs. Haney a statement as to what I knew about this. I told her that she could get a statement from the detectives' office or from the claim agent of the Illinois Central. You were present with her when I told her that. I did not tell her that the rules of the railroad forbid me to give a statement and that I would not give a statement. I refused to give you a statement. I don't remember when that was. Mrs. Haney had not been to see me before.

Haney's next duty after the train backed in there was to close that switch and go back to his office and he should have done that immediately after the train cleared the switch. There are cinders on all cinder tracks. There are cinders north of the Frisco tracks. There is what they [fol. 114] call the cleanings, just been thrown back away from the track there. I suppose that little pile along there was about 18 inches high, that is a rough guess. It is back better than about 7 or 8 feet from the north rail. It doesn't start at the rail, it is back from the rail about 9 feet.

I work for the Illinois Central Railroad System. That consists of the Illinois Central, the Yazoo & Mississippi Valley and the Gulf & Ship Island. I do not work for all of them. I draw my check from the Yazoo & Mississippi Valley Railroad. I am railroad yard conductor or engine foreman for the Illinois Central System. The Illinois Central doesn't put out any badges of any kind that indicate the Illinois Central, or anything like that, with the exception of

one place they have a badge that they use. I carry a pass of the Illinois Central Railroad System and have carried one since I have been with them and in service long enough to be eligible to get a pass. I ride on the Illinois Central Railroad with that pass and of course do not have to pay fare and have done that ever since I have worked with them. I came to St. Louis on an Illinois Central passenger train, rode on my pass and did not have to pay fare.

I was not present when any examination of Haney's body was made as to whether there was any jewelry or watch on it or whether he had any rings, or any pocketbook in his possession. I saw no evidence of any struggle, and I saw no pipes or clubs or anything around where I saw Haney's body. I took Haney's gun away from the scene because Mr. Bundy told me to put the gun in my pocket. Mr. Bundy was my superior officer. That night, as soon as I came back from making the Mo. Pac. delivery I gave the gun to Mr. Berry, special agent for the Illinois Central Railroad, who was there at night in the territory of the depot. That was around 35 or 40 minutes after I found [fol. 115] Haney's body. I didn't pay any attention to whether the pistol was loaded and didn't even look to see what kind of pistol it was or what make it was. I didn't tell you it fell out of his hand, I said it was laying in his hand when I turned him over. When we rolled him over to the right we could see the pistol laying in his hand. Only Mr. Bundy and I were there then. He and I both turned him over. It was dark there but we both had lanterns with us and had them burning. We both took hold of him to turn him over. His hand was laying there and the handle of the pistol was laying in his hand, the same as the handle of the lantern was in his left hand. His hand was not gripped around the pistol; his hand was open and it was laying in his hand. Before we turned him over we saw a small place on the back of his head on the right side where he was injured. His cap was laying there about a foot in front of his head. It was a little white cap. I did not inspect it at all. It was not moved while I was there. There was a place on the side of his face with the dirt from the cinders where it seemed as though his face had slid in the cinders. That was on the right side of his face. His head was about 5½ feet from the north rail of the Frisco track.

When that Frisco train backed in I was at Carolina Street and it backed past me. I never paid attention to the speed of the train because I was talking to the engine foreman of the engine house. I had instructions when I came back from the Missouri Pacific to get what is known as the "slop cut" out of the house and take it to the south yards. I could not see the open switch from Carolina Street because of the building of Stratton-Warren.

The next thing I did after the Frisco train backed in, I walked down Broadway towards the south to the crossing, to Haney's shanty, about one block from Carolina Street, which would be perhaps a little more than 250 or [fol. 116] 300 feet. I walked up to Haney's shanty and the door was locked and I stood there a minute or two and looked west up the track and saw the wye switch was still red. That was the switch at the Frisco track which Haney had thrown. Then I walked up that way to see what had happened, because it was customary to always line that switch back after all of the movements had been made over it for the main line, and for Haney to return to his shanty. I had expected Haney to close that switch and return to his shanty. He had to return there in order to change the electric light to let us pull north with our engine. That light is above the center of the crossing, and is operated from within the shanty.

It was because that light was red when we came up there that we could not proceed north. He had that light for the Frisco passenger train because it was switching over Main Street there. There was another switch engine headed north that would stop for that red light 6 tracks farther across. That was Bundy's crew's engine, and No. 4 train was on the track this side of that. According to the rules and regulations, our engines had to wait until the light turned before we crossed over.

The claim agents for the Frisco Railroad and the Illinois Central System made the measurements of the things shown in these pictures marked A and B. They were talking about it out here. They were not there when I came up to the detective's office, but they came up to the detective's office afterwards. We left the detective's office, I suppose around 10 o'clock or maybe a little before 10. We went to the scene of the accident before 11:15. The detectives stopped and left the car on the corner of Main and Calhoun Streets and we walked up there to the south end of the depot

and walked around the wye around on Broadway where this accident happened. They were fully an hour, I guess, at the scene of the accident. They were not arresting me [fol. 117] and there was no suspicion against me. The reason that they had me was because I was the first man to find Haney. They asked what time I got off and wanted me to come up there and make a statement that night, but after I told them we didn't get off until late they told me to be there the next morning at 8 o'clock.

I was never down where Haney's body was lying when anybody was there besides Bundy and myself until Mr. Pattison came up. After I went and broke the glass in the door of the shanty and gave the board to the Illinois Central train, I did not go back to the scene of the accident but got on my engine and made the Missouri Pacific delivery. I did not see any other railroad men or other parties go up towards the scene of the accident after I left there. I never did see Haney's body after that. I guess I knew Haney 30 or 35 years. I was at the undertaker's parlor and saw Haney's body but did not talk to Mrs. Haney, before he was buried, as to how he was killed. The next morning after the accident there were only five of us at the scene. They were Captain Gleason, Mr. Owens, two claim agents and myself. I suppose we were around there about an hour, that is, Mr. Gleason and Mr. Owens and I were. We were just looking around and talking.

Cross-examination.

By Mr. Gentry:

You now call my attention to the photograph marked Trustees' Exhibit A, and I see the level place between the end of the ties of the north rail and the raised part in the picture. That was practically level with the ties, as you can see here. Over across that level space the cleanings of the tracks, from these tracks here and from these tracks over here, where it is mostly thrown off of the right-of-way. That is the part that I said was raised 18 to 20 inches.

From the switch stand to the point where the first pencil is shown in the photograph nearest to the Frisco track, I said was 14 feet. I saw the claim agent take the tapeline [fol. 118] and make the measurement and I read it on the tapeline as it was made. I saw them making the measure-

ment from the north rail of the Frisco track to that pencil that is nearest to it and I saw that the distance was 5 feet 9 inches, and I saw the measurement made from the north rail to the second pencil in the photograph, the one on the elevated part, and that was, I think, either 12 or 13 feet. I have in my pocket the pass that I spoke of that I used in coming up here on the Illinois Central train. I now show that to you and I'll take back that pass and give you the pass that just preceded it. The only differences are in the color and in the years in which the passes are good, otherwise the passes are identical. The pass I now hand you was good until December 31, 1943, and is now marked Illinois Central Exhibit 1. That is my signature there on the end of it and I observe the large letters at the top of it in the words "Illinois Central System." On the back of the pass are the words "unless otherwise ordered or limited on face, this pass will be honored on the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad and the Gulf & Ship Island Railroad." I know those three railroads and they go to make up the Illinois Central System. I have ridden on my pass on the Y. & M. V., but I have not ridden on the Gulf & Ship Island.

(Here follows 1 photolithograph, side folio 119.)

DEFENDANT ILLINOIS CENTRAL R. R. EXHIBIT 1.
(Front)

Illinois Central System

Pass



No. 40856

***** C. J. BRUSO AND WIFE *****

ENGINE FOREMAN, MEMPHIS, TENN.

UNTIL DECEMBER 31, 1943 UNLESS OTHERWISE ORDERED

**VALID WHEN COUNTERSIGNED BY
P. LYNCH OR J. K. LAUDER**

COUNTERSIGNED

J. H. Bevan
PRESIDENT

HOLDER SIGN HERE IN INK

THIS PASS ACCEPTED SUBJECT TO CONDITIONS ON BACK

(Back)

1941-2-3

SERVICE PASS

**NOT GOOD ON TRAINS 5, 6, 7, 8, 30, 31, 32, 33, 34, 35, 36,
37, 38 AND 39, NOR ON SUBURBAN TRAINS OR BETWEEN
SUBURBAN STATIONS.**

Unless otherwise ordered or limited on face, this pass will be honored on the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad and the Gulf and Ship Island Railroad.

This Pass is not transferable, is void if presented by any other than the person or persons named thereon, or if any alteration, addition, or erasure is made on it.

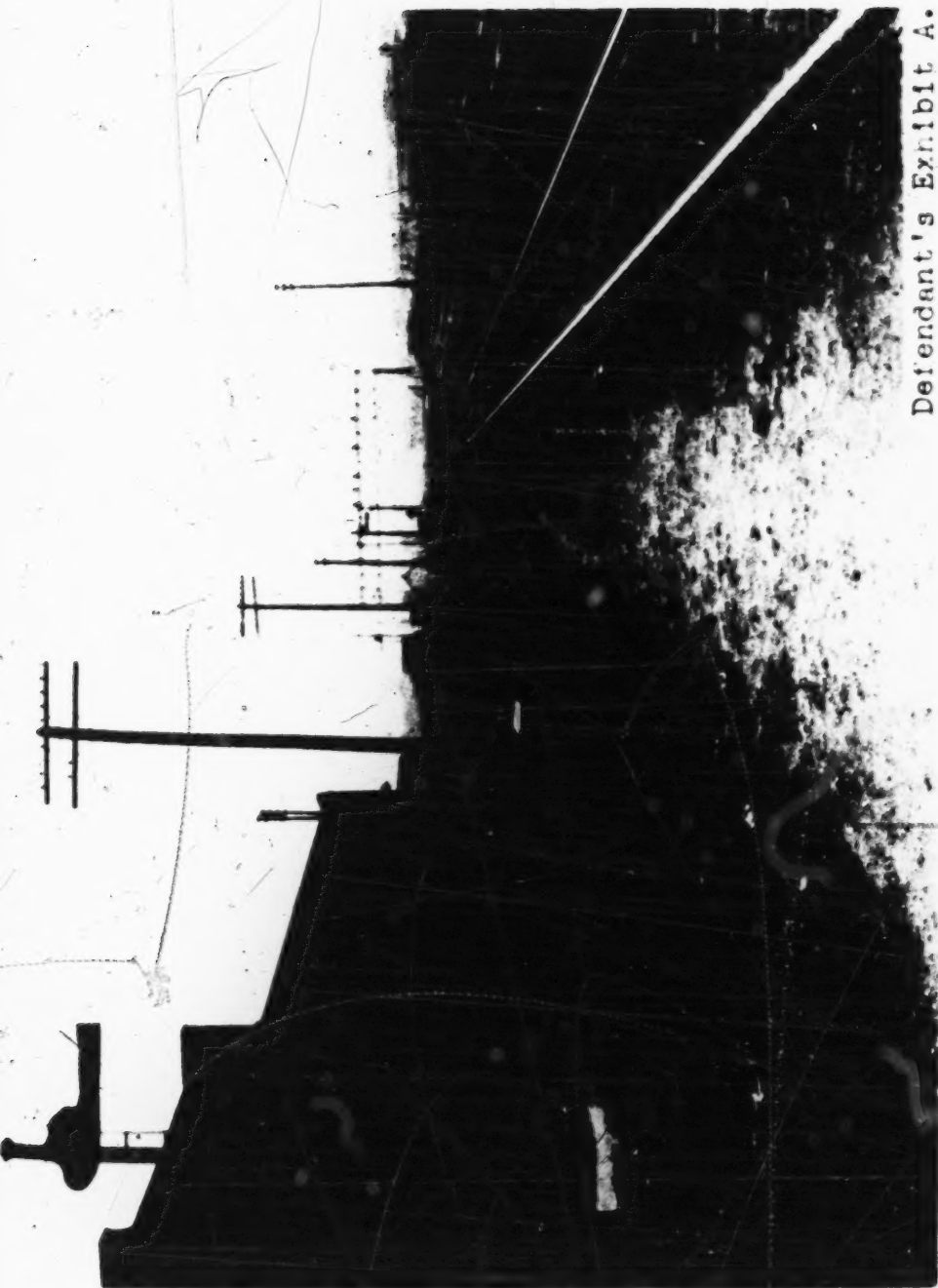
The person accepting and using this Pass thereby assumes all risk of accident or damage to person or property; states he or she is not prohibited by law from receiving free transportation, and will not use this pass in violation of any law.

[fol. 120] Recross-examination.

By Mr. Edwards:

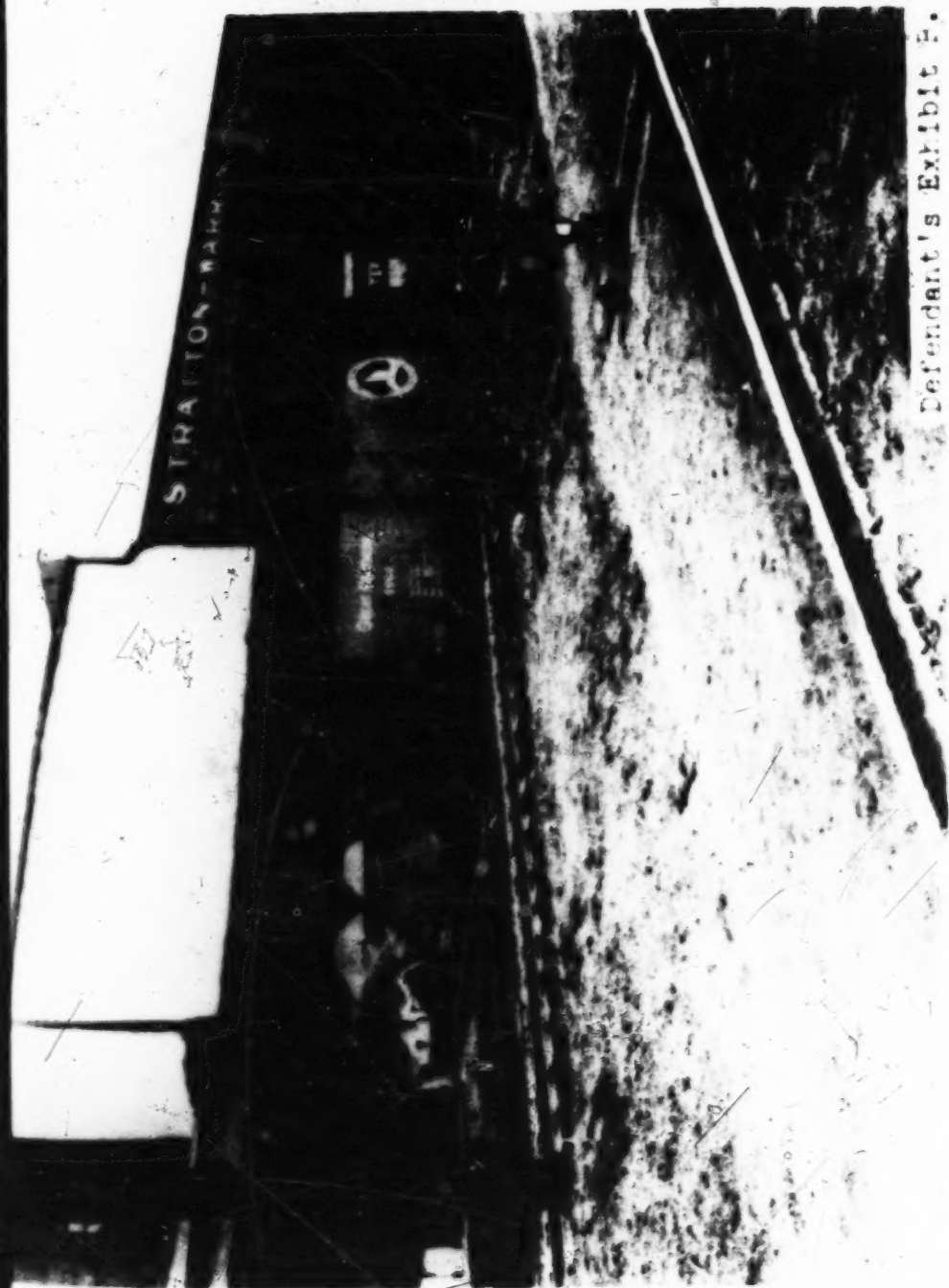
We do not have any identification that we wear when we are working. The Brotherhood of Railroad Trainmen put out a button to their members when they pay dues for the month, a small round badge with the emblem of the B. of R. T. I suppose it is about as large as a quarter and it specifies the month and the year on that button and that shows that you have paid your dues in the Trainmen for that month. Almost all of the employees that belong to the Brotherhood of Railroad Trainmen wear those buttons and the switchmen's union of North America have the same sized button. Lots of the men belong to both lodges and wear both buttons. You do not have to wear them, it is just simply to show that you are in good standing and have paid your dues in those organizations. I don't work for the three railroads of the system. I work for the Yazoo & Mississippi Valley, the Y. & M. V.

At this point counsel for the trustees, an adjournment over night having occurred, offered in evidence the Trustees' Exhibits A, B, C, and D, and the same were received without objection. They are as follows:

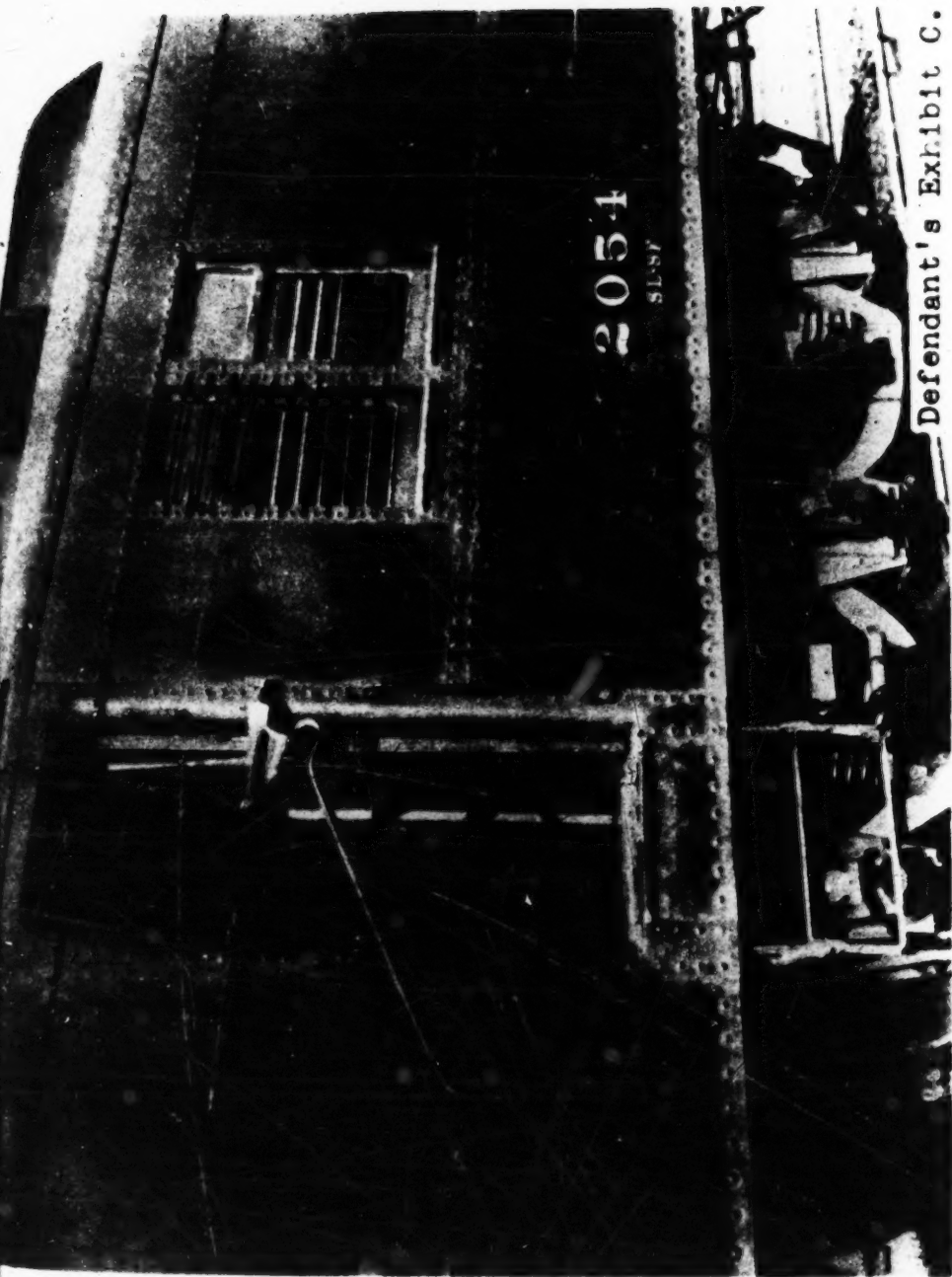


Defendant's Exhibit A.

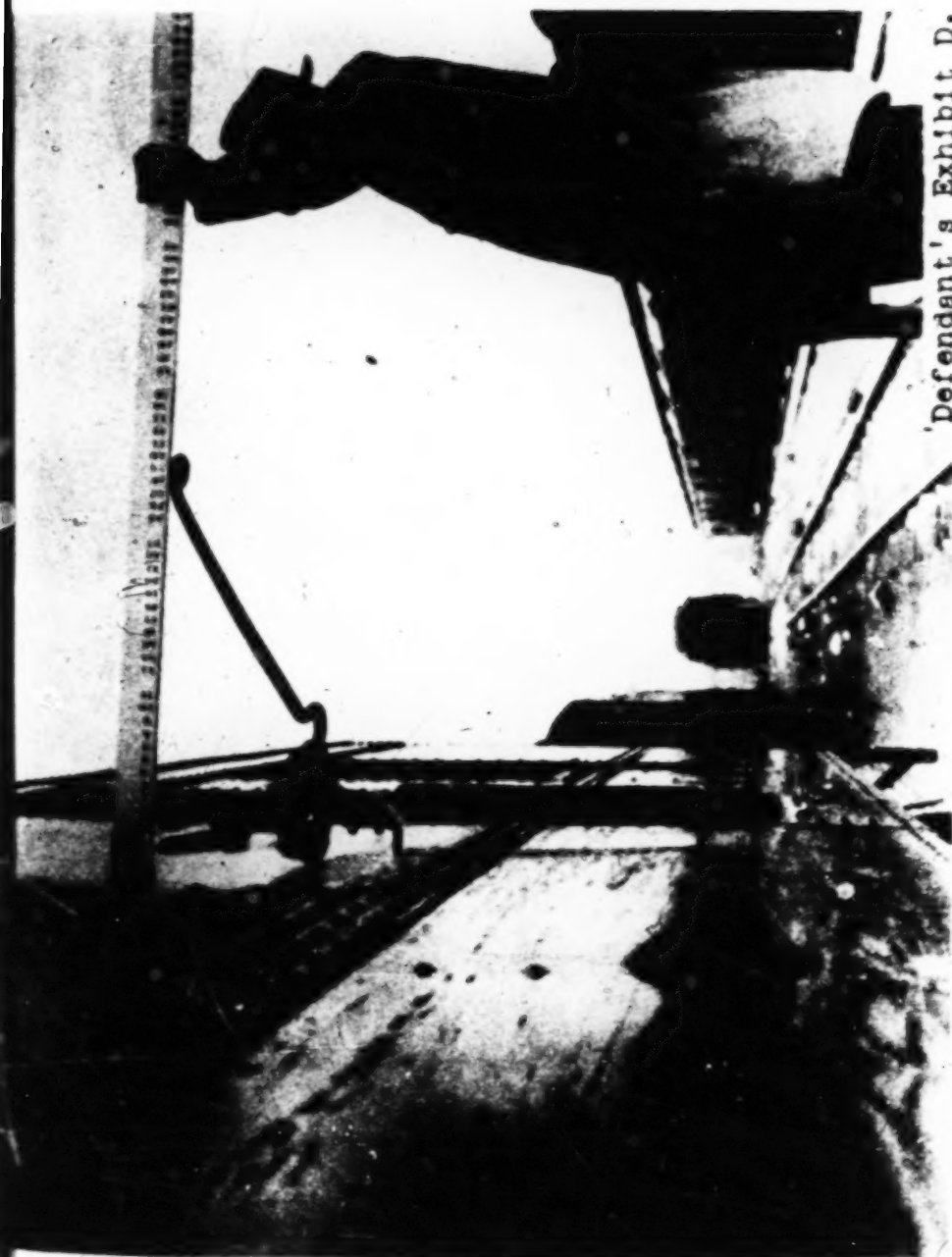
120-A



Defendant's Exhibit 2.



Defendant's Exhibit C.



Defendant's Exhibit D.

[fol. 121] Cross-examination.

By Mr. Edwards:

was thereupon continued as follows:

The two pictures marked Trustees' Exhibits A and B, respectively, were the only pictures taken on the morning following the accident that I know anything about. I do not know whether or not there was one more. I did not see them taking any pictures at the switch or east of the switch. I said yesterday there was a small mound about 18 inches high north of the Frisco track.

There was no train switched over the track at which Haney was killed after that Frisco train backed in and before I found his body. That night when I left the shanty and walked over towards the place where Haney was killed, walking about 200 or 250 feet to the switch, I could see the red light on the switch but could not see the switch. The red light on the switch designates the switch stand, but I could not see the stand until I got about 20 or 30 feet from it, and I could see the form of the body there. I did not know at that time who it was until I got up there. I have not been to that place since then.

I did not see any holster of a pistol on Haney.

On the morning following the accident when the pictures were taken a commercial photographer named Pollard took the pictures. Mr. Gleason and Mr. Owens directed me to set those pencils where Haney's head and feet were; that is, I showed the spots and they set the pencils there where I told them the spots were when I first saw the body.

Ora L. Young, being duly sworn, on the part of the defendants testified as follows:

My name is Ora L. Young. I am with the office of Defense Transportation, Division, Railways, District Rail Director, U. S. Government. I have charge of a district that includes Memphis and the territory in that direction. I am under [fol. 122] Mr. Joseph P. Eastman, the director of transportation of the railways in the country during the war effort, and my duties include supervising transportation for all of the railroads in my district. That has to do with

the train operation, maintenance of way, maintenance of equipment, to furnish equipment, check faulty operation to handle the shippers and load cars and all phases connected with the rail movement, including handling of troops, supplies and other materials. I am paid by the U. S. Government. I have held that position since October 16, 1942. I was notified that I had been requisitioned to go on this position for the duration by Mr. John R. Flippin, special representative of the Office of Defense Transportation at Memphis, and I was requested by the Government to take the position; I accepted it and have been there since that time.

At the time when I accepted the position I was superintendent of terminals for the Frisco Railroad at Memphis, and had a total service with the Frisco Railroad since 1913. Prior to that I had worked for the Santa Fe and the Union Pacific, and had spent my life in railroad work since I was a boy in the operating department. I worked in various positions on railroads, including working on the track, trucking in the freight house, serving as check clerk, transfer clerk, brakeman on a freight train, switchman in the yards, assistant yardmaster, assistant general yardmaster, general yard inspector, superintendent of terminals, division superintendent, and then later back as superintendent of terminals. I was in that position when I went to the Office of Defense Transportation.

As superintendent of terminals for the Frisco at Memphis, I was located out at Yale yards, five miles south of Memphis. In the early part of the evening of December 21, 1939, I was at the Grand Central station in Memphis, because of the Christmas mail and heavy passenger traffic. I was ordinarily there in the evenings, starting from the 15th of December up to and including Christmas, and I considered that a part of my duties to be there at the station during that period.

The Frisco train that comes up from Birmingham to Memphis and goes on to Kansas City is Train No. 106, and is called "Kansas City-Florida Special." I remember that train coming into Memphis that evening while I was at the station and I saw it come in. Some time after the train arrived the station master, McDonald, reported to me an accident on Broadway. Following the conversation with McDonald we looked over the equipment on train 106 on both sides from the front to the back. I did not find any-

thing in the way of rods, stakes, wires or anything else protruding from the side of the train anywhere along on either side. Everything was in its normal position from the engine to the back end. I then went down to the scene of the accident. That train passed me about a city block and a half from the depot on Carolina Avenue on my way down; as I was going down the train was leaving.

When I got down to the scene of the accident Haney's body was not there. It had been removed. The only man I noticed at the scene was switchman Bundy, an Illinois Central switchman. I went to the scene of the accident at that time and made observations. My observations were made on both sides of that wye switch stand, both east of it and west of it—from Kentucky to Main street on both tracks. There was a spot of something that was apparently blood where the head of Haney was reported by Bundy to have been. I couldn't say that it was blood. That spot which was apparently blood was just due west of the switch stand 13 or 14 feet. I stepped it off at the time. The spot was about six feet north of the Frisco track. I measured it with two steps, which were about six feet. There were two marks that could have been toe prints a little farther than the length of a man's body back where the blood spot was. Those dragging marks that I spoke of that appeared to have been made by his toes I would say were between 13 and 14 feet north of the [fol. 124] north rail of the Frisco track. It was four and one-half steps up to where the marks were. They were on top of a little mound where they put cleanings. I would have judged that distance to be 13 to 14 feet. I looked over the area between Main and Kentucky streets on both tracks for something dragging or any kind of marks that might be there. I saw no evidence of any body having been dragged along, or moved in an east or west direction or of anything else being dragged in an east and west direction. Approximately 450 feet west of the wye switch there is a switch stand on Kentucky street about seven feet high with a light on it on the north side, the engineer's side of the track. It sits back about four feet from the track.

After my investigation I went back to the station. There was only one mail car on the train as it came into Memphis. The two cars next to the engine were cut out at Memphis.

There were no mechanical defects about the cars that were left at Memphis.

After I got back to the station we looked those two cars over again. There was no mechanical defect about the cars and they assumed their regular run the next morning on 105.

There was no blood that I observed anywhere on the rails down there around the scene of the accident or on the passenger train itself or any part of it. I had an electric flashlight with me.

At that time I had been superintendent of terminals at Memphis since March, 1937, over two years before the accident happened. I am familiar with what is spoken of as Haney's shanty. In the 24-hour day, three eight-hour shifts worked there. Mr. Haney was on the second shift. The proper designation of Haney was switch tender. The switch tenders handled the traffic light on the crossing and they had four thrown switches to take care of in the vicinity. There were switches for the Cotton Belt freight trains in and out of the Iowa yards; the west wye [fol. 125] switch entering the Grand Central Station from the Frisco, one switch of the N. C. & St. L. & Rock Island which used a single track jointly and the other switch was a freight switch where freight trains and switch engines were operated right adjacent to the shanty on the north side. All of these switches were worked from the shanty by Mr. Haney, handling the lights overhead for traffic and he handled or threw all of these four switches that I have described.

I am familiar with the contract that has been called the Grand Central contract of 1934 that was offered in evidence here by the plaintiff during the trial, and I was present when it was read in court. My duties as superintendent of terminals at Memphis required me to be familiar with it. Under that contract the Frisco paid \$1.87 $\frac{1}{2}$ a car for cars that went into the Grand Central Station. They also paid for water and heat. Pay for the services of the three switch tenders, including Mr. Haney, was separate. The Frisco paid two-twelfths of the total. They paid no wages directly to any of those men, including Haney. To my knowledge, Haney was never on the payroll of the Frisco while I was superintendent of the terminals. Neither I nor any of the officials of the Frisco had any supervision over Haney. If we had cause for complaint due to a delay or

regulation we handled it with the superintendent of the Y&MV. The three switch tenders were not under my direction there. They performed a service, throwing switches, and the Frisco contributed two-twelfths of the cost of that for all three of them. The original contract, Plaintiff's Exhibits 4 and 4-a attached to it (4-a being the map), is now shown to me. It is the Grand Central contract entered into between the Illinois Central and the Frisco. I recognize it as being the original of that contract. As superintendent of terminals I had a copy of that in my office. Bills were submitted monthly under that contract for services rendered under it to the Frisco. I personally okayed the bills, which included the \$1.87 $\frac{1}{2}$ a car and any charges [fol. 126] for water and ice that I told about, but did not include the three switch tenders that worked in Haney's shanty. This wye switch was not on the station premises shown in the map attached to the contract. Haney's shanty was not on those premises. I am familiar with the following language of the contract: "The lands, premises and buildings embraced within said passenger terminal being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines on said print, and for convenience all such tracks and facilities shall hereafter be referred to as the passenger terminal." Referring to the print or plat attached to that contract, of which a photostatic copy has been identified as Plaintiff's Exhibit 4-a, I am familiar with the print or plat. It is so prepared that west is the top of the print. Broadway is shown at the left-hand side of the print and runs north and south. The Illinois Central tracks are shown running north and south, the long way of the map. The right-hand side of the print is to the extreme north and the left-hand side is the south and the bottom of the print is east. A portion of the station facilities is shown there in tinted red as referred to in the paragraph of the contract mentioning it, and the tracks are colored in red as stated in that paragraph. I now put a letter X at the point representing where the wye switch involved in this case was. That point is not in the joint facilities. It is under an expired franchise of the City of Memphis and is a city street that it is permitted to operate on. That is a designated city street. I have now placed a circle where Haney's shanty is located.

There was a letter of agreement entered into covering the payment by the Frisco of the two-twelfths of the wages of the three switch tenders, including Mr. Haney, that worked at this switch shanty and performed the service. As I recall, it was dated in May, 1935. You now hand me here a letter contract, dated April 18, 1935, which has been marked by the reporter as Defendants' Exhibit F, [fol. 127] and purports to be the Frisco's copy of the original letter contract of that date, covering switch tenders you have spoken about. I recognize that and it is a correct letter contract.

(Said letter was introduced in evidence by the counsel for Frisco Trustees and is as follows:)

Defendant Trustees' Exhibit F, written on the letter-head of the St. Louis-San Francisco Railway Company, is as follows:

TRUSTEES' EXHIBIT F

Springfield, Mo., April 18, 1936.

Mr. W. Atwell, Gen. Mgr., Illinois Central R. R. Co., Chicago, Ills.

DEAR SIR:

This letter in duplicate is for the purpose of arriving at a definite understanding with respect to the proportion of the expense Trustees of the Frisco are assuming in connection with the flagmen's service being performed at Texas and Broadway, Memphis, Tenn.

The agreement under which this service originally was a portion was dated Sept. 27, 1906, but same is no longer in effect, therefore, in order to have a definite understanding suggest the Frisco be billed by the Illinois Central on the following basis:

2/12 of the regular crossing flagman rate of pay.

2/12 of the cost of electricity furnished for operation of color signals.

The cost of fuel, ice and other miscellaneous supplies to be apportioned on the percentage the crossing flagman rate bears to the switch tender rate which is being paid at the present time. The Frisco to bear 2/12 of that percentage which runs from about 47 to 48¢ at the present time.

[fol. 128] If you are agreeable, will you please sign one copy of this letter and return.

Yours truly, F. H. Schaffer, General Manager.

Accepted: William Atwell, Vice President & General Manager, I. C. R. R.

I had a copy of that letter in my office as superintendent and we were billed for 2 12ths of the three switch tenders' wages and the expenses of those lights as referred to in there. That is the only contract we had with reference to those three switch tenders.

Cross-examination.

By Mr. Gentry:

In the course of my railroad service I became a member of the Brotherhood of Railroad Trainmen; I have held membership in it 34 years and still hold membership in it and pay monthly dues. That Brotherhood, through its lodges, have what is known as a working button. As long as I can recall our lodge has had the buttons—since 1915 or 1916. The boys were still wearing them in 1939 and are still wearing them now. One purpose in wearing them is to show that a man's dues are paid up to date and the other reason is that the switchmen's union was trying to get the trainmen as members. A button is now identified as Defendant Illinois Central's Exhibit No. 2. That button is the standard B of RT button. Some used to be a little larger than this type. This is the type they have worn for a number of years. None that I have ever seen bore the initials or name of any railroad, and I have seen a whole lot of them. The only difference in them from time to time was a change in color and in the month and year.

(Defendant, Illinois Central Railroad Company, thereupon offered in evidence said button marked "Defendant, Illinois Central Exhibit No. 2." The following is a photostatic copy of the face of the button.)

110A

ILLINOIS CENTRAL R. R. EXHIBIT 2.



[fol. 129] In examining that button I see that that is the design of button that was used by the members of the Brotherhood of Railroad Trainmen. That wheel with the spokes represents a brake wheel. The Illinois Central Railroad Company at intervals presented bills to the Frisco Railroad Company for the matters covered by the contract and also covered by the letter that I read. The services of the three switch tenders where Haney served were included in the bills once a month. The Yazoo & Mississippi Valley Railroad was a railroad corporation and it operated in Memphis and south of Memphis. In a general way it serves the Mississippi delta down as far as New Orleans.

I am also familiar with another railroad known as the Gulf & Ship Island Railroad. I checked their records the other day. That railroad operates in Mississippi and Louisiana in connection with the Illinois Central. It is also a separate railroad corporation. I am familiar with the Illinois Central Railroad which begins in Chicago, Ill., and extends to New Orleans and Birmingham. It goes through Memphis.

I am familiar with the term Illinois Central System. That is the name that is used to designate all three of these railroads making up the system, just as we see advertisements in St. Louis about "Missouri Pacific Lines" or "Frisco Lines," where separate railroad corporations are included in the term "lines."

I was familiar in a general way with the employees of the Y. & M. V. Railroad down there and with the station called the Grand Central Station at Memphis. The Chicago, Rock Island & Pacific, Frisco, Illinois Central and Y. & M. V. Railroads ran their trains into and out of that station in 1939. The Rock Island does not have offices or places of business in that station building, but the Illinois Central and the Yazoo & Mississippi Valley do. A few years back the Frisco Lines used to have a superintendent's [fol. 130] office in the building, but they did not in 1939. The I. C. and Y. & M. V. did.

Florida Street is west of Main Street. Main Street is approximately 200 feet east of the shanty which I marked with a circle on the plat. Main Street runs north and south.

Florida Street is approximately 125 or 150 feet west of the switch and Kentucky Street is about 350 feet west of Florida Street. Florida Street and Kentucky Street, as

well as Main Street run north and south. Broadway runs east and west.

Cross-examination.

By Mr. Edwards:

I live in Memphis. I do not still carry a pass on the railroad. I came up here on a pass on the Frisco Railroad.

My office is now at 403 Corn Exchange in Memphis.

The contract is with the Illinois Central Railroad. I couldn't testify as to the ownership of the Grand Central Station. I never made inquiry about that. The contract is signed by the general manager of the Illinois Central. The name of the Yazoo & Mississippi is not on the contract.

Under the contract of April 18, 1935, I paid 2 12ths of Haney's wages to the I. C. Railroad on the Yazoo & Mississippi Valley bill. I didn't make the payment, I signed and okayed the bill, but this contract stipulates that. The bills presented were according to the contract and I couldn't testify as to the payment, the accounting department vouchers our bills. The operating department did not make the payments. As far as receiving monthly bills that I okayed, the contract of April, 1934, was carried out; so far as payments, I don't know. I couldn't definitely tell you whether the Illinois Central Railroad Company owns the Yazoo & Mississippi Valley, because I don't know what the setup is. The Illinois Central System is composed of three railroads that I know of. I could not say definitely [fol. 131] whether the Illinois Central owns any interest in the Yazoo & Mississippi Valley or not.

On the night of the accident, Dec. 21st, I received, at the station, word that Haney had been injured. I couldn't tell you just exactly what time I received that word, it was up around 8 o'clock, possibly a few minutes before, maybe a few minutes after. I then went and looked the equipment of the Frisco train over. We were responsible for the operation of all Frisco trains. I personally examined trains where there was a report of an irregularity, where the train might be involved. That is the reason I examined this train, to protect our interest. After the train left, I went down to the scene of the accident to protect the interest of the company. I did not write down the measurements that I have been testifying to. I mean to tell the jury that without writing this down I independently re-

member that the blood I saw down there that night was 6 feet from the track and that I saw certain imprints in the sand 13 to 14 feet from the track. I did not write it down or make any memoranda. I reviewed the statement I made, but I knew that before I came up here, I was equipped that night with a flashlight. I always carry one on the property at night. It was dark. There was no light there, but a switch light with red on two sides and green on two. That light does not light up the place for reading purposes. The ordinary person can see on a dark night a fairly good distance. You can walk in the dark without a light. I walked down there without using the flashlight. After I got down there I used the flashlight for the examination I made. I had to do it with a flashlight. I had no tapeline or rule of any kind with me. I stepped off the distances. I did not make any other measurements than those I have told the jury.

The ground was level from the north rail of the Frisco tracks to a point approximately 8½ feet north thereof, where this ridge of cleanings had been thrown out from [fol. 132] the railroad tracks on both sides. There were no uneven places along there. East of the switch the ground was level there too. You had a railroad track to walk over if you walked parallel to the Frisco, but the ground north of the Frisco tracks was level and east of the Frisco tracks was level, a nice wide walkway there. That was not elevated above the tracks for about 8½ feet from the track, that is where the yard cleanings started. The switch that Haney was to throw was somewhere around four feet north of the north rail of the Frisco tracks at that place. The hangover of the train would come out about two feet north of the tracks, more or less. I did not distinguish the color of the blood on the cinders that night. I said there was something on the ground that looked like blood. I am not a chemist, I am a railroad man; I don't believe I could distinguish a spot of blood at night. The spot I saw could have been blood. I was there the next morning in daylight some time shortly after seven o'clock. There was no claim agent with me either that morning or the night before.

After I examined the place down there I returned and examined two cars of the train again. They were a baggage car and a mail car. I looked over both sides the same, I

examined the mail catchers. That is what is referred to here as the mail hook. Examining those was part of my duties as superintendent of terminals. In re-examining those cars I was not trying to find out if anything had struck Haney. We were looking for defects. We did not get a report that something sticking out from that train hit Haney. I am positive we did not. We made a second examination of the two cars (mail and baggage car) because it is a part of our duties, part of the duties of a superintendent when an injury occurs on property to make a thorough examination and it was done. That is the only reason in the world I had for the second examination. When I made the first examination after I had received the report of Haney being killed, I made a thorough examination [fol. 133] as far as I could go on it. There was no difference whatever between that examination and the one I made after I went down to the scene of the accident except that when we returned we tested out the mail catchers. We did not do that in the first place because the mail clerks were occupying the cars. We wanted to get the train moving. The mail car had side doors opening from the inside, and the baggage car had side doors opening from the inside on rollers. I couldn't give you the exact measurement of the height of the floor of a mail car or a baggage car, but I would probably say it is a little less than 5 feet high. I have not had occasion to measure one of those in years.

I said I went west of the Frisco switch and made an examination. I examined the rails, I examined the ties, I examined the walkway on the north side of the Frisco. I did not examine the rails and ties because anything indicated that a rail or tie had struck Haney. It was a course of procedure we were required to go through in connection with our duties when there is an accident and the responsibility has not been determined. Normally I do not make an examination of trains personally such as I did in this case unless there is some accident reported. If I am on a station platform and a train goes by, I look at the wheels and truck beams. That is force of habit, due to years of experience. If any passenger train came into that station, if there was anything that developed, I would take time to examine it in the station. In the course of a 24-hour day I would say that probably at least 25 trains passed through that station. As I said, my principal duty was to meet all Frisco trains, to expedite the loading of mail, express and

passengers, and give the trains personal supervision to keep them on time. I might say at that time I walked around equipment on practically every train that I had supervision over. During the evenings I examined all of the Frisco trains that came in there.

Part of the time I do that and the rest of the time I do [fol. 134] not. If there are any trains that have had trouble on the line I look them over. We make an inside inspection on all outbound equipment to see if the equipment is in order. When I am at the station I examine the trains in the station at the time I am there. I had others working under me performing those duties. The number varies. My best judgment is that there were at least five in December, 1939. In this instance I was alone in the round I made around train 106 the first time. The second examination I was attended by the car inspector Armand and coach foreman Drashman. In so far as the handling of trains is concerned, Drashman worked under my supervision. We issued instructions to mechanical people.

A few minutes after I learned of the accident, I talked to Drashman when I ran into him. Drashman did not tell me that he had heard some switchman or someone there at the scene of the accident say that something sticking out from the train hit Haney. Drashman has never told me that at any time. I would say I saw Drashman within five, ten or fifteen minutes after I heard that Haney had been injured. I didn't look at my watch. Drashman walked to the scene of the accident with me, or what was reported to be the scene of the accident. As he walked with me to the scene of the accident he did not talk to me about his report of the accident. Drashman did not at any time discuss with me what he knew about the accident. He was with me when the two set-out cars at Memphis were examined. As far as train operation was concerned, I was his boss. If he learned anything about an accident of this kind I am satisfied he would report it to me, and he did not report anything.

I was in court yesterday part of the time when Drashman was testifying. I heard a part of his testimony; I was in and out and I didn't hear all of it. I was not in the courtroom and did not hear him testify that a man said some- [fol. 135] thing about something sticking out from the train and hitting Haney. I wasn't in the courtroom when any-

thing like that was said. I never at any time heard Drashman make any such statement.

I couldn't tell you just exactly when I saw any of the claim agents of either the Frisco Railroad or the Illinois Central after the accident happened. I think I saw Mr. Westbrook, the Frisco claim agent, the afternoon of December 22nd, and I believe it was several days before I saw Mr. Munson, who is the claim agent for the Illinois Central and the Y. & M. V.

As I was approaching that Frisco switch the night Haney was killed, I was governed by the switch light and paid no attention to the form of it and therefore I couldn't tell you how far I could see the form of the switch. I hesitate to make a guess because I did not pay any attention to the switch until I got to it. I saw the light as I approached. I had a report of Haney being injured somewhere near the switch. I did not look at the switch to see if I was approaching the proper place. I didn't have any occasion to, because the switch light was my direction in getting there. I was walking straight up to it. I wasn't hunting the switch in the dark; I didn't have any occasion to gauge any distance where I might be going, as far as that is concerned. I knew this switch had been there for years and I knew trains used that switch. As I went down there I assumed I knew where I was going; I found where he was hurt. I heard he was hurt around 14 feet from that switch. The report I obtained was from depot master McDonald. He didn't tell me it was 14 feet. We stepped it off where we saw a wet spot on the ground. I was in error when I said that the report I got was that he was hurt 14 feet from the switch. I got a report he was hurt on Broadway. When I first got the report that he was hurt on the Frisco switch was when I was down there hunting the spot. Broadway is shown right at the top of the map. [fol. 136] When we just took a recess for the lunch hour you had just asked me about Broadway, and I had pointed out to you that this place here south of the track (indicating on map) is Broadway. That is not down on the street; that is not used by pedestrians and vehicular traffic. That is not elevated over the streets. Broadway is on the street level. They put subways under there on the north and south side of the street, Broadway, through east and west. Where the Frisco train backed in as indicated on this map

as Broadway is not above the regular street level, but a subway was constructed and put in operation at Florida Street, which is west of that point, in 1937 and 1938. Vehicular traffic does not move east and west over this part of the map showing Broadway. Traffic does not move north and south on these railroad tracks. All that is pedestrians in there. I couldn't testify whether that is a public walk for pedestrians, because it has been going on over there ever since I have been there, where pedestrians are walking up and down Broadway all the time, walking up and down the grade on Broadway. Only the pedestrians use the railroad track as a walkway. I might add that is a city street; it was franchised out to the railroad for railroad purposes, and pedestrians apparently, or at least during my time in Memphis, have not been shut off from there. It is not thoroughly policed to stop pedestrians going up and down Broadway. Automobiles never drive east and west over the railroad tracks, or north and south on the tracks, other than a railroad vehicle or type of automobile. Broadway runs east and west, and east and west is where the bulk of pedestrians travel. They walk east and west over the railroad tracks close to the shanty. They walk there regularly, a number of them, both day and night. When I was in the management of the Frisco Railroad I was there at least four or five times a week or oftener. I left there in October, 1942. There is no other track for the Frisco to back in on as it did that [fol. 137] night from the west, other than this track that it was backing in on at the time Mr. Haney was killed. The trains are also backed in from the east, around the other way, when they are pulled out.

I knew Lyman Elmer Haney during his lifetime. He had nothing to do with the mechanism of that Frisco train 106, the upkeep of it or examination of it. That was under the control of the engineer and conductor and the balance of the train crew that was operating at the time.

By Mr. Skinker: I want to formally introduce into evidence the Grand Central contract of 1934, which has been identified as Frisco Trustees' Exhibit E, and further identified by the witness Young; and also to formally introduce in evidence at this time Defendants Frisco Trustees' Exhibit F, which is the letter contract of April 18, 1935, iden-

tified by the witness Young. Said documents are respectively as follows:

(For contract see p. 20; for map attached see opposite p. 102.)

DONALD WILLARD SCOTT, being duly sworn, on the part of defendants testified as follows:

My name is Donald Willard Scott; I live at Memphis, Tenn.; am a pipe fitter, now employed by Chicasaw Ordnance Works. In December, 1939, I was employed by the Crane Company, at its warehouse at 725 Florida Avenue, north of the Frisco tracks. I was present when a colored fellow working there picked up a pocketbook on the 27th day of December, 1939, in the morning just as we were coming to work, somewhere around 9 o'clock. The pocketbook was picked up in my presence and I opened it myself. It had in it a Social Security card, a Brotherhood card, a two-year pass with the Illinois Central Railroad System, and the name Haney was on the papers. There [fol. 138] was no money in the pocket book. It was a little brown genuine leather billfold that had a place for cards and a place to put currency. There was no currency or money of any kind in the billfold. It was found on a two-by-four inside of a solid fence made of boards about seven-eighths inches thick and 8 feet high. The fence was right at the edge of the sidewalk, a roof extended out over it, and it was about 2 feet below the top of the fence. After I saw the name on the papers I said: "That name is familiar." I grabbed the telephone and called the telephone number I found in the book for that name, but I got no answer. I then called my superintendent and gave the pocketbook to him and he gave it to the police department. I have never seen it since that time.

Cross-examination.

By Mr. Edwards:

I saw in the paper that Mr. Haney had been injured down on the track. There was a gate in the fence that was open sometimes at certain hours of the day. Some days it might be open quite a long time and other days not at

all. The pocketbook was not soiled at all and appeared to be perfect. It did not appear to have been lying out in the rain or snow.

There was a four-foot sidewalk right east and in front of the fence on which this pocketbook was found, and Florida Street was right in front of that, east of it.

When I found the pocketbook I looked in the telephone book and found the number of the name of the party whose name was on the papers. I called the number twice, but got no answer. The colored man who found the pocketbook in my presence was Chester Green. He lives in North Memphis, but I couldn't give his address.

I came to St. Louis riding on a pass on the Frisco Railroad and that railroad is paying my time while I am up here. The Illinois Central has nothing to do with the arrangement.

[fol. 139] Redirect examination.

By Mr. Skinker:

I would say that the brace on which the pocketbook was found was about 5 feet 10 inches or maybe 6 feet above the ground and about 2 feet below the top of the fence, on the inside of the fence.

Further cross-examination.

By Mr. Edwards:

The pocketbook was found within four feet of the gate.

G. W. CREAGH, being duly sworn on the part of the defendants, testified as follows:

My name is G. W. Creagh. I live at 233 North Willett Ave., Memphis, Tenn., and am employed by the Frisco Railroad as passenger train conductor and have been such conductor for 30 years.

I was passenger conductor on train 106 that came from the South into Memphis on the evening of Dec. 21, 1939. I got on that train at Birmingham which was the point of origin of the train.

My record shows that that train arrived in Memphis at 7:25 on the evening of Dec. 21, 1939. We were due to ar-

rive there at 6:55, so we were 30 minutes late. Coming into Memphis that train travels west and has to cross the I. C. main line. I recall that the train stopped at that main line that evening. We then got a signal to proceed west, and the train pulled on up west of what is called a wye switch where we back into the Grand Central station. It is my duty to be on the rear of the train coming into Memphis, and I was there at that time. I was there when it passed the wye switch. I had an air valve by which I could control the automatic air on the train and stop it or slacken its speed. That was independent of the engineer. That is the ordinary procedure for a conductor backing [fol. 140] into the station, he operates the air from the back end of the train.

There is a separate device by which he transmits signals to the engineer, called a whistle signal; it is operated by a bell cord above the conductor's head. It was my duty to notify the engineer when the back end of my train had passed west of that switch where I wanted to stop and I notified him by two blasts of the whistle. That means stop. He stopped, 20 to 30 feet west of the switch we used to back into the station. We were then prepared to back in in an easterly direction and around the curve in a northwardly direction into the Grand Central Station. That was the regular nightly procedure every time I was on that train. I saw Mr. Haney after we came up there and stopped and he lined that switch for us so we could go back into the track that takes us up into the station, off of the main line and around the curve into the station. I saw the switch tender line that switch, I didn't know Haney personally, but I saw the switch tender that was usually there do that. I spoke to him just like I would speak to anybody in passing. After he lined the switch for us, the switch light on there was red. The switch tender then crossed over to the south side of the track opposite the switch that he had lined. He came across the track just the least bit to the southeast of the switch stand. We backed up in a very few seconds after he had crossed over. I did not see Haney after that. The last I saw of him he was standing south of the track in good clearance. He was on the fireman's side as we were backing up into the depot. The fireman was Willie Ryan. He is dead. After Haney had crossed over to the south side of the track I gave the engineer a signal to start backing. He responded

to it with two blasts of the whistle. That is in compliance with an air brake test we make before we back up. We made that test on that occasion. It consists in drawing up enough air out of the back end of the back-up hose to [fol. 141] know that the brakes are working, taking hold. We do not have to completely stop the train in order to do that. We started backing in there. I gave it that air brake test and did not completely stop the train. We proceeded then backing in in an easterly direction; the track then veers to the left or north as we go around coming into the station. I remained on the back end of the train in control of that air all the way into the Grand Central station. We stopped to clear the I. C. tracks which are the north and southbound tracks. In backing into the station, we had to cross over the I. C. main line and on the movement into the depot we were stopped on account of something on the I. C. track. I got the signal to stop from a switch tender and from my brakeman, Stubbs. I acted on that signal and stopped the train myself with that air hose. I later got a signal to proceed and then went on back into the station without further stop.

That train was what we call a vestibuled door train, a modern type train having what we ordinarily understand to be vestibule doors on both the Pullmans and the day coaches.

I do not know of any way for a person on the south side of my train as Hanev was, as I started back, to get over to the north side while the train was backing up there or while it was stopped. He didn't have any way to get through that I know of. I do not know of any reason in my railroad experience for him to cross over there, or attempt to cross over through that train. I do not know of any way he could have crossed through that train when we were backing in.

As conductor of that train I was the superior officer and in charge of it, responsible for its safety and in charge of the train. That is true in railroad circles everywhere. On the trip from Birmingham at the stop before we got to Memphis, I got off on the platform and went as far as the baggage cars back and forth along the side of the train. [fol. 142] At every station where we stopped I was up to the baggage car, not the full length of the train. I found no condition about the train that was out of the ordinary. Everything so far as I was able to tell was in good condi-

tion on the entire trip and no report was made by me of anything out of the ordinary.

Memphis was the end of my run and I left the train at Memphis and it was turned over to another conductor.

Cross-examination.

By Mr. Gentry:

After the switch was set properly, the switch tender, who was Mr. Haney, crossed the track and the last I saw of him was when he was on that side. For many years it has been the rule in the transportation book of rules for a switchman when he throws a switch like that to cross over the track before the train moves up. That is a safety regulation to prevent the switch tender from inadvertently throwing the switch before the train is completely in the clear. Mr. Haney complied with the rule on that occasion and did what switchmen customarily do.

Redirect examination.

By Mr. Skinker:

I have a distinct recollection of Mr. Haney moving over to the south side on that particular occasion, the night of Dec. 21, 1939.

Cross-examination.

By Mr. Edwards:

I talked to Mrs. Haney, the widow, once after the accident. She came to my house and I told her what happened as near as I could. I did not tell her that I didn't know whether her husband got on the train and rode from the shanty down to the switch. I did not tell her that my flagman, Stubbs, said he did but that I could not remember. Stubbs did not tell me that he saw him get on the train at the shanty and ride down to the switch. Mr. Haney did [fol. 143] not get on that train and ride down to the switch and get off. I did not stop that train near Mr. Haney's shanty; I stopped clear of the I. C. main line. When the back of my train passed Mr. Haney's shanty, it was just moving. We had just started and moved about 20' or 30 feet with 12 cars. No one swung on that train and rode

down to the switch, I don't know the distance from Haney's shanty down to the switch. I would not say it was as much as two city blocks and I would not say it is more than 100 feet. I don't know; I didn't ever measure it; I haven't got any judgments on things like that unless I had the actual measurement. The switch tender did not have a custom of swinging on my train and riding down to that switch. He might have done it once in a while, but I wouldn't pretend to say how many times. I did not tell Mrs. Haney that her husband swung on the back end of the train and that as we were riding up to this switch we talked about Christmas. I did not tell her that I had just been sick and couldn't remember which side of the switch her husband was on. I did not have any conversation similar to that. I told her her husband was on the south side of the tracks when I last saw him and I didn't say anything about the north side.

When my train passed over the switch that Haney had opened it was running about four miles an hour. We got going faster than that after we were backing into the depot, probably five or six miles an hour, but not faster. I don't know how far that switch is from the depot. Mrs. Haney did not ask me to give her a written statement. I had not been sick just before she called to see me. I had been on this particular run about 20 years; I don't know exactly how long I had seen Haney there; I didn't know Haney. I knew he was the switch tender, because it was night I couldn't tell you who he was. I always spoke to him and he would speak to me. I don't remember whether it was too dark to see his features but I wouldn't have [fol. 144] known whether it was him or not, because I didn't know him. I don't know what his next duty was after we backed the train into the station. Switch tenders do not come under my supervision, and I don't know what their duties are. I still work for the Frisco Railroad.

The last stop before we got to Memphis was Holly Springs, 45 miles from Memphis. I don't know how large the town is. Sometimes we have quite a few passengers getting on there, then again we don't have anybody. I don't know how many we had that night or whether we had any getting off there. I know we stopped there because it is a regular stop and we had to stop there to deliver mail and express. I did not walk the entire length of that train at that place. I did not at any time

on that trip at one place walk the entire length from the head of the train to the back end. I would go part one time and part another. We have inspectors inspecting the trains at all terminals. I don't attempt to do that. The side doors of the baggage car and mail car were opened at the depots to load mail and such as that. I couldn't say about taking baggage on and off but we did take mail on. The first time I saw Haney he was, I suppose, about ten feet from me. I could not see how he was dressed, as there was no artificial light around there. I could not see whether he had any badge on his cap or coat when he was 20 feet away from me. He had an electric lantern for signal purposes and to make a light too. It was a white lantern. I couldn't see whether Haney was wearing a hat or a cap because I didn't pay any attention to what he had on his head nor did I see whether he had any pistol on him. The station was located on the fireman's side. The last stop we made where the station was on the right side of the train was at Tupelo, Mississippi, 105 miles from Memphis. There I looked at only two or three cars as I went by discharging my duty. I mean two or three cars from the head end. We had three baggage cars and one mail car [fol. 145] and the rest of the cars were Pullmans, chair cars and dining car. Stubbs was my rear brakeman. He dropped off of that train at the I. C. main line. That plat is a Chinese puzzle to me. I don't recognize it generally as a drawing of the place there at the scene of the accident. Stubbs' duty was to drop off at the I. C. tracks crossing and go around the curve where we backed in there to see that we backed into nobody and to hold any traffic that might be coming down, stop it from going across there while we were backing. I made a statement to the claim agent. I don't remember the date of it but it was a short time after the accident. Since then I have discussed the matter with Mr. Westbrook, a claim agent for the Frisco Railroad, since I came to St. Louis. I have not discussed it with the I. C. claim agent. All I gave the claim agent for the Frisco was the date of the train and what happened on our trip and I told you all that I told Mr. Westbrook.


J. E. MEE, being duly sworn on the part of the defendants, testified as follows:

Direct examination.

By Mr. Skinker:

My name is J. E. Mee. I reside at Memphis, Tennessee, and am employed by the Frisco Railroad as locomotive engineer and have been so employed as engineer for the Frisco about 38 years. I operate a locomotive on passenger trains. I was locomotive engineer on train 106 between Birmingham to Memphis on the evening of December 21, 1939. I got on my engine at Amory, Mississippi, which is a division point for engine men. I took the same engine on through from that point to Memphis. We had 12 cars in the train. The mail and baggage cars were next to the engine behind the tender and we had coaches and sleepers behind them. I remember that when we got to the I. C. main line in Memphis [fol. 146] the lights were against me and I stopped my train at that point. In coming into Memphis we were actually traveling to the west. After the green light came on at the I. C. crossing, we proceeded on west past the wye switch until the conductor pulled me down. I expected to get a signal from him when the back end cleared the wye switch, which is the switch where we were to back into the union station. I got a signal from the conductor to stop the train and I stopped up at Kentucky street. There is a shanty there about five or six feet from the track and on the north side of it. There are two switch tenders up there at Kentucky street. We went the length of three cars and a locomotive beyond that shanty at Kentucky, and stopped on a signal from the conductor on the rear end of the train. I got a blast of three whistles on the air from the conductor to start backing up. I couldn't see the back end of the train from my position in the cab because of a curve. As I went in there going west, my engineer's seat was on the right side of the cab, which would be the north side. In starting the backward movement I always looked back at the movement of the train, turned and faced the rear end, in the direction we were going, and watched the movement of the train. That is my duty, to look down to the back and alongside my train as I start backing. We lean out of the window to do that. It is up to the engineer whether he leans out the side or looks

through the rear vision window. The first cars I was looking at would be the mail and baggage cars, and I was looking back along the north side of them and as far back as I could see. As we made that backward movement the conductor controlled the air brake on the train from the rear end of the train. We stopped the train on that occasion before we got into the station and, with his signal which I had to get from him before I could move, I started again. I could see nothing of the rear end. It was on the curve and out of sight. After stopping and getting his signal to proceed, I backed on clear into the station. We were stopped only one time after we started the backing movement over the switch. I am familiar with that wye switch that lets my train go in there. I did not see Haney or any person at that switch as I approached it and passed it. I didn't see any person lying on the ground or standing up there or anybody at all near the side of my train. I did not see anybody up around close to the side of the train at any time throughout the backing movement, clear on into the station. I was at all times looking out of my window toward the rear past the side of the mail and baggage cars at the head of the train. I was backing around the curve to the left and north and upgrade. It takes more power to back up around a curve than on a straight track, and in addition to the curve we were backing upgrade. We were going approximately 8 miles an hour before I got the signal to stop. When we start back onto such a curve the conductor gives an air brake test and our answer is two blasts of the whistle. That is the running test which he makes with the train in motion. The idea is to see if the brakes hold and if he has got good control of them. The test was made on that occasion.

Cross-examination. 

By Mr. Gentry:

I didn't see anyone there on the north side of the track as we passed that wye switch and I did not see any lantern or electric light there. I have been railroading a great many years and I am pretty familiar with the practices of switchmen. Rule 104 instructs switchmen when they throw such a switch as that wye switch to go to the opposite side of the track. They have had accidents where they stand at the switch. That is a safety measure so that the man wouldn't

throw the switch as they are backing in and that has been observed many years. That would put the switchman on [fol. 148] the south side of the train as we passed. If he was injured on the north side, that was after our train got by.

Redirect examination.

By Mr. Skinker:

As I was backing this train in on that particular occasion and looked along the side of the train I did not observe any rod, mail arm or any instrument of any kind swinging out or protruding out from the side of my train.

Cross-examination.

By Mr. Edwards:

I have met Mrs. Haney. She never asked me to give her a statement of what I knew about this case. She came to my house and talked to me about it and asked me what I knew about it. I told her I didn't know absolutely nothing about it; in fact I didn't. I didn't have any statement to give her. I did not tell her it was against the rules to give her a written statement. I told her the claim agent would get the statement and if she wanted a copy of it it would be satisfactory to me. I might have told her that I gave it to the claim agent and that she could get it from him if he wanted to give it to her. I did not tell her our railroad forbid its employees to give statements to any but claim agents. I have never known the railroad to have anything to say about that.

The first I knew of the accident was reading about it in the paper the next morning.

The lower part of my window of my cab is about 8 or 9 feet above the rail. It is something like that. My head would be about 10 feet above the rail.

I didn't see any switch tender as I looked back, and I don't know whether there was any switch tender there or not. I did not pay any attention to the switch tenders at Kentucky street. I suppose they were in the shanty. I don't recall that I did. I saw one when he gave me a signal [fol. 149] to come across. I think I saw him when he gave me a signal to come over. He then went back to the

shanty. In backing up I wasn't looking for him. I was looking at the rear of the train. I wouldn't know whether I would have seen Haney or not if he had been there. It is possible there could have been somebody lying there and that I wouldn't see them. It is likely I would not have seen him. I don't think there was an electric light there at that particular switch. I never paid any attention to it. I never looked down at the ground. I looked back as far as I could see the rear end and watched the gauges on the engine. I don't know anything about whether Haney was lying there at that switch when I passed or not. I didn't see him there. The headlight was on the engine until we got up in the yard and cut it out, but I never looked that way. When I am backing up I never look that way; I never look west; I look back to keep my eye on the movement of the train. From the time I got my signal to back up until the time I backed up into the station I never looked back towards the front of the engine.

As I backed in when the conductor stopped me the first time the switch engine had him blocked and he stopped me. My train was about 1,000 or 1,100 feet long, having 12 cars and an engine and tender. The mail car was next to the tender and next to the mail car were the baggage and express cars. I didn't have a list of cars. They okay the air to me at the terminal and tell me the number of cars and that they are all working. They don't tell me what cars they are.

After we passed the switch and the conductor pulled me down I know that the rear end of my train was west of that switch, and the front of it was then 1,100 feet or more west of the switch. I suppose we backed up about 300 feet or something like that when I was stopped. After that I got another signal to back up and I backed up and continued [fol. 150] backing on into the station. After I got moving I was going about eight miles an hour. Of course, we have to increase the speed a little bit around the curve, because it is a bad curve, and I suppose we would be going about ten miles an hour there. I don't think we could have been going any faster than that around a curve. After we get down near the station it is level ground. It was a level track from where I started backing up and we didn't get to going up-grade until we were right around that curve. If, as you tell me, you have just measured this map and that it indicates

that from that Frisco switch into the station is 2,700 feet; that sounds about right to me.

Q. In what distance could you stop that train, with safety to yourself and the passengers, going eight miles an hour on a track such as this you were backing in on and conditions such as those?

By Mr. Skinker: We object to that because there is no issue of that kind made by the pleadings; there is no charge that Mr. Haney was seen or could have been seen and they could have stopped the train after seeing him; no issue of that kind made in this case. The sole charge is that some protrusion from the train hit him.

By Mr. Gentry: I make the same objection. It is not pleaded that anybody was guilty of negligence in not stopping the train.

By Mr. Edwards: That is part of the case; they didn't stop it; they didn't remove it; they could stop it and remove it.

By Mr. Skinker: Remove what?

By Mr. Edwards: That is part of the negligence.

By Mr. Gentry: The negligence is specifically pleaded and that isn't pleaded.

By Mr. Edwards: That you negligently had something sticking out from this train and hit this man; that your clients didn't furnish him a safe place to work; that is the charge in this case.

[fol. 151] By the Court: It is cross-examination; the witness may answer.

To which ruling of the court the defendants, and each of them, by their counsel, duly excepted and still continue to except.

A. You can stop within a little over 100 feet.

Q. That would be going eight miles an hour?

A. Yes, sir.

Q. Take the same question going ten miles an hour, in what distance could you stop it?

By Mr. Skinker: We renew our objection.

By Mr. Gentry: Renew it for the Illinois Central.

By the Court: Objection overruled.

To which ruling of the Court the defendants and each of them, by their counsel, then and there duly excepted and still continue to except.

A. I have never made no test.

Q. That is 2 miles faster than 8 miles?

A. That is getting pretty close. I haven't studied it that close. I am a pretty good judge of speed, but I haven't studied it that close.

Q. Do you think you could stop it in the same distance going 10 miles an hour that you could going 8?

A. I think so.

Q. About the same?

A. Yes, sir.

When a switch tender lines a switch like that he is supposed to go to the opposite side of the switch according to Rule 104. I don't know the switch tender's duties. After we clear the switch his next duty is to throw the switch back immediately, and that is what they usually do. On our railroad I never saw the switch tenders stand alongside the switch as we backed in on other occasions.

I don't know what the condition of the lights about the wye switch was. I didn't see any artificial light over the switch or near the switch. Train 106 was about 40 minutes late in Memphis that evening. It was due there at 6:50 [fol. 152] and arrived about 7:30. I couldn't say how far away I could see a rod about 2½ inches in diameter at that time. I couldn't say whether I could see it as much as 50 feet away or not.

I am still running on that Frisco train. My train backs around the curve by that Stratten warehouse. Outside of that there are two buildings from that wye switch to the switchman's stand. The warehouse is north and northwest as you back around the wye.

C. J. Brusco, being recalled for further examination by defendants, testified as follows:

Direct examination.

By Mr. Gentry:

I am a member of the Brotherhood of Railway Trainmen and my lodge membership is held in the Chickasaw Lodge 347 in Memphis, Tenn. Each lodge has an individual name and number. There is another lodge of that order, known as Lodge 489, in Memphis. In the lodge that I belong to there were Illinois Central men, Yazoo & Mississippi Valley men, N. C. & St. L. men and Rock Island men. They were all employees who had duties about the yards. Lodge No. 489 consisted of Frisco and Missouri Pacific men. The Illinois Central and the Y. & M. V. have a road lodge separate from the yard lodge. All of those lodges were a part of the same brotherhood. I have belonged to Chickasaw Lodge since 1914. I understood Mr. Haney was a member of that same lodge. When anybody paid his dues in any of those lodges they issued a monthly receipt with the year and the month on it. The dues were paid once a month. They give you a button with the month and year on it if you want it, and if you don't want it you don't have to take it. A great many employees wear those buttons on their caps or hats. I saw a great many of them in and about the [fol. 153] yards wearing them. Yesterday I identified the button that is marked Exhibit 2 for Illinois Central Railroad Company. I never saw any employee from any lodge or who worked for any railroad that wore one of those buttons that had the name of any railroad whatever on it. They are issued by the lodge, the Brotherhood of Railroad Trainmen. All of the employees of the railroad, and as far as I know other roads were required to study rules designated as the "Uniform Code of Operating Rules." They examine you every four years on the rules. When a new man comes on he is instructed and examined. In the larger railroads, such as the Frisco System, the Illinois Central System, the same rules are in force. The rules require that when a man throws a switch, no matter whether he is called a switchman or a switch tender, and the train is standing and waiting for him to throw the switch, to step over the other side of the track or 20 feet away from the

switch; whether he does one or the other depends on the conditions when you line the switch.

Cross-examination.

By Mr. Edwards:

I remember testifying that Haney's next duty was to close the switch immediately after the train had cleared it, and his duty then was to return to the shanty and turn this light over the shanty so that those engines headed north could go across the tracks. That is true.

Thereupon defendants Frisco Trustees rested their case.

[fol. 154] **JOHN ROBERT BURNS**, being duly sworn, on the part of the defendant Illinois Central Railroad Company, testified as follows:

Direct examination.

By Mr. Gentry:

My name is John Robert Burns; I am 58 years old; am married, and live in Memphis, Tenn.; am employed by the Yazoo & Mississippi Valley Railroad Company and have been employed by it 32 years. That railroad has an office in the I. C. station at Memphis. I am trainmaster with that road and have been trainmaster since 1927. Before that I was chief clerk for the Yazoo & Mississippi Valley Railroad Company. Before that I used to be with the Frisco, in various jobs, in the transportation department. Most of my work has been office work. I have never been a switchman or an engineer.

As trainmaster for the Yazoo & Mississippi Valley Railroad Company in 1939 and prior to that I hired all the men in train and yard service of the Yazoo & Mississippi Valley Railroad Company, such as engine men, switchmen and switch tenders, and I would examine all of them. As trainmaster for the Yazoo & Mississippi Valley Railroad Company I did not employ Elmer Haney, whose death is in question here, but he worked under me. I had supervisory duties over him and he was under my orders. I know of my own knowledge that he was employed by the Yazoo & Mississippi Valley Railroad Company and devoted all his

time to the service of that company. Twice before his death a question came up which was discussed with him as the result of a physical examination he had made. Every four years men are re-examined physically and also on the rules and regulations. It was my duty to examine Haney on the rules along with the others, and I did examine him on that subject. I learned of a report that had been made by the examining physician as to the physical condition of [fol. 155] Haney, and as a result of that report I had a conversation with Haney. As the result of that report I had to take him out of service and did take him out of service. As a result of my having to take him out of service, Haney came to me and I had a conversation with him regarding his health. I told Mr. Haney I would have to take him out of service because the doctor had decided that his health was such that it wasn't safe for him to work under the conditions; he had an organic heart trouble. I told him that. He said "All right." Then I suggested to him that he go to the Chicago general hospital for re-examination, if he wasn't satisfied with it. The first time he was off in 1934 he was off from February until the 30th of March. We arranged for him to go to the hospital in Chicago. We had to give him an order to go back up there. He brought back evidence that he had been there. Later I called Haney into the office and informed him we were going to let him go back to work, but I had to keep in close enough touch with him and observe him often enough to know whether his physical condition would permit him to continue in the service or not, and I did that. I told him he must take good care of himself, not use intoxicants and get his rest regularly and not let things excite him. He promised to do that. Every time I would see him I would talk to him about his health and observe him; that is what I had to do.

I told you I gave instructions on the rules and examined men on the rules. Those were the transportation rules and regulations. They were known as "Uniform Code and Operating Rules." They are uniform, they are standard rules adopted by all the railroads in the various classes, class 1 railroads especially, such railroads in which are the Frisco, Illinois Central and the Yazoo & Mississippi Valley. I can speak for the Frisco because I worked for them. I know about their rules. I know the rules are the same as

[fol. 156] ours, standard rules, and I am sure the Missouri Pacific also had the same standard rules.

Q. I show you a rule book of the Missouri Pacific Railroad Company and call attention to a rule designated in the rule book as Rule 104-a, which is divided into a number of paragraphs, and the part I address to your attention is the fourth paragraph, and I will ask you to look at that fourth paragraph and tell us whether or not that is the same that was in the rules that you taught to Mr. Haney and on which you examined him and which governed his operation as an employee of the Yazoo & Mississippi Valley Railroad Company?

A. Yes, sir, it is the same as ours. I saw it in your office this morning.

Mr. Gentry: I offer this fourth paragraph of this rule in evidence. It is as follows (reading): "When a main track switch has been set for a train, the person attending the switch must go to the opposite side of the main track and not return to the operating switch stand until the movement has been completed."

By the Witness: I taught Mr. Haney that rule and examined him on that rule and found that he was familiar with it.

Cross-examination.

By Mr. Edwards:

I said I was with the Yazoo & Mississippi Valley Railroad. Mr. Claude F. McDonald worked for the same road. He was the night station master. I think there was a Pattison that worked for the Missouri Pacific as yardmaster there. I don't know whether he was the man you refer to or not. I wouldn't say for sure whether I ever saw Frisco Exhibit F before or not. I know that contract was in existence. The Yazoo & Mississippi Valley Company's name is not mentioned in that contract because it isn't necessary. The contract is signed by William Atwell for the Illinois Central Railroad Company. He signed it on April 18, 1935, for the Illinois Central. That was to pay [fol. 157] two-twelfths of Mr. Haney's wages, the Frisco to pay it to the Illinois Central Railroad. I am familiar with most of the terms of the contract. Mr. Atwell who signed the contract as vice-president of the Illinois Central is an

officer of the Yazoo & Mississippi Valley Railroad also. He is an officer of the System; he has charge of the G. S. L., the Y. & M. V. and the I. C.

My office has always been there in that station and is there now.

Mr. Haney worked pretty regularly. I would have to check the time sheet to know if he worked every day.

I am not a physician and do not pretend to examine people physically. Every time I would see Haney since 1934 I would size him up. I would say I saw him a dozen times in the last year of his life. I would always try to see him at least once a month. I didn't lecture to him about his health, but I talked to him about it. I don't know how much time Haney lost from the first of January, 1935, to the date of his death.

Redirect examination.

By Mr. Gentry:

I have seen these lodge buttons on men's caps. I never saw any employee of any railroad down in Memphis wearing any button of the Brotherhood of Railroad Trainmen that had the name of the railroad on it, indicating the railroad that he was employed by.

Recross-examination.

By Mr. Edwards:

The hospital in Chicago that I referred to was an Illinois Central System Hospital. I go up there. I am a Y. & M. V. employee.

At this point the defendant Illinois Central Railroad Company rested its case.

[fol. 158] Plaintiff's Testimony in Rebuttal

ALVIN A. HANEY, being recalled, testified in behalf of plaintiff in rebuttal as follows:

Direct examination.

By Mr. Edwards:

I testified the other day that I went to the Frisco switch near where my father was killed that evening after I had gone to the hospital. I imagine it was around 8:30 or 9 o'clock when I arrived there. I saw some man there, but I do not know his name. He appeared to be dressed as a railroad man. It was so dark near that switch that I could not see a thing as large as a 3-inch pipe 25 feet away, and, of course, I could not see a 1-inch pipe as well as a 3-inch pipe. As well as I can remember, when I arrived there the light on the switch stand was green. I did not have a flashlight with me. Other parties there had a lantern. I did not see any blood there, it was too dark. The green light there did not throw out a light illuminating the place, it is not there for lighting purposes. I couldn't see the switch stand underneath the green light.

The next morning I went back there, first to my father's shanty and then to his switch. I went to his shanty to get his light and his belongings, his lantern, and then I went up to the switch. That was where I saw this spot of blood. I couldn't see it the night before.

I never heard of my father having heart trouble that I know of. I was married and lived only about a block away from there. The only time I knew him ever to lose any time was when he would lay off on payday, maybe go down to a show or something. I know nothing of my father having been affected with heart trouble. I did not hear of anything of that kind. If he ever went to the hospital in Chicago, I didn't know anything about it. We have relatives up [fol. 159] there and he had been up to see them several times. I don't remember of his being up there any length of time in 1934. He never lost a month of time straight from January, 1934, to his death, that I know of, on account of sickness.

MRS. JULIA B. HANEY, being recalled for further examination, testified in behalf of plaintiff in rebuttal as follows:

Direct Examination,

By Mr. Edwards.

I was on the witness stand a few days ago and was sworn. I never knew of my husband having been affected with any illness or sickness or heart trouble. I did not know of his going to the hospital in Chicago. We have a cousin in Chicago and we have been there several times.

After my husband was killed, I went to see Mr. Creagh, the conductor on the Frisco train. I asked him if he knew anything about Mr. Haney's being hurt and he told me that he didn't know anything about it, the only thing he knew was, knew he was there and threw the switch and he just spoke words something like good evening; he said that was about all he knew. Mr. Creagh said he had been sick and that his memory wasn't so good, that he didn't remember much about it. He said my husband rode with him up to the switch and then he jumped off there and talked about Christmas or the weather or something, he couldn't remember just exactly what it was, because he had been sick and he had just gotten back out on his run from being sick. He said his memory wasn't so good. He said he didn't remember anything about my husband going to the south side of the track; he didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards.

I went to see Mr. Mee, the engineer, to find out what he knew. He didn't tell me anything. He said it was against [fol. 160] the rules of the railroad to give out any information about anything like that; I would have to go to the claim agent to find out what I could about it. He wouldn't tell me anything.

I went with you sometime in August, 1940, to see Mr. Bruso at his home and we met him in front of his house. He wouldn't tell me anything either, because he said he had made his statement to the railroad and I would have to go to the railroad and find out about it; he couldn't tell me anything about it. That is all he would tell me. I couldn't tell you how much my husband was off in the

last five years of his life, because he worked awful steady.

He would never be off, only if we would go to town on paydays, he might lay off. He did not drink intoxicating liquor, and never has.

Cross-Examination

By Mr. Gentry.

I do not remember that from the first of February to the 10th of March, in 1934, my husband was not working at all. I do not remember that on account of being laid off he went up to Chicago to see if he could get straightened out about his health in the hospital. I certainly don't know a thing about that at all: My husband did not tell me that on account of his health Mr. Burns had to let him out and he never told me that he went to the hospital in Chicago.

Mr. Brusco did not tell me anything about making a statement to the police.

Mr. Creagh did not tell me that he saw my husband close to the track at the switch and he did not tell me where my husband was standing.

Plaintiff rests.

Both sides rest.

And the above and foregoing was all the evidence offered in the case.

[fol. 161] (At this point at 11:20 o'clock A. M., the Court having duly admonished the jury touching their proper conduct while Court should not be in session, declared a recess until 2:00 o'clock P. M., of the same day, at which time all parties being present, further proceedings were had in the case at bar, to-wit:)

DEFENDANTS' ADMISSIONS

By Mr. Gentry (Out of the hearing of the jury): The defendant Illinois Central Railroad Company admits that on the 21st day of December, 1939, Lyman Elmer Haney died in the City of Memphis; that subsequently the plaintiff, Walter A. Lavender, was duly appointed Administrator de bonis non of the Estate of said Haney, has duly qualified as such and is now serving in such capacity and has full authority to bring this suit.

This defendant further admits that on the 21st day of December, 1939, and long prior thereto, and down to the present time, the defendant Illinois Central Railroad Company has been and is a railroad corporation duly organized under the laws of the State of Illinois and engaged in the business of operating railroad trains as a common carrier in Interstate Commerce, passing through many states of the Union.

This defendant, Illinois Central Railroad Company, further admits that train No. 106, which has been referred to in the evidence, as having passed over switch thrown by Mr. Haney on the evening of December 21, 1939, was a train that was coming from the State of Alabama, through the State of Tennessee and into the State of Missouri and was on said trip at said time.

By Mr. Skinner: Defendants Kurn and Thompson admit they are the duly qualified trustees of the St. Louis-San Francisco Railway Company and they are now engaged in the railroad business in interstate commerce, and were on December 21, 1939; that Walter Lavender was appointed as Administrator de bonis non, has the letters of, and is Administrator de bonis non at the present time.

[fol. 162] Thereupon, the defendants, J. M. Kurn and Frank A. Thompson, trustees of the St. Louis-San Francisco Railway Company, debtor, presented to the Court in writing and prayed the Court to give and read to the jury a peremptory instruction in the nature of a demurrer, in words and figures as follows:

MOTIONS FOR DIRECTED VERDICT

"Now at the close of all of the evidence in the case, the Court instructs the jury that under the law and the evidence, plaintiff is not entitled to recover against defendants J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, and your verdict should be for said defendants."

Which said instruction the Court refused to give.

To which action of the Court in so overruling the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

Thereupon, the Illinois Central Railroad Company presented to the Court in writing and prayed the Court to give and read to the jury a peremptory instruction, in words and figures as follows:

“At the close of all the evidence offered in the case, the Court instructs the jury that, under the pleadings and the evidence, the plaintiff is not entitled to recover against the defendant, the Illinois Central Railroad Company, and your verdict must be in favor of the said defendant.”

Which said instruction the Court refused to give.

To which action of the Court in so refusing to give and read to the jury the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

[fol. 163] PLAINTIFF'S INSTRUCTIONS GIVEN

Thereupon the plaintiff presented to the Court in writing, and prayed the Court to give and read to the jury, and the Court did give and read to the jury, instructions in words and figures as follows, to-wit:

“Instruction No. 1

“The Court instructs the jury that before you can find a verdict for plaintiff and against defendants, J. M. Kurn and Frank A. Thompson, trustees for the St. Louis-San Francisco Railway Company, debtor, under instruction No. 2, given you herein, you must first find and believe from the evidence that Walter A. Lavender is now the duly appointed, qualified and acting administrator, de bonis non, of the estate of Lyman Elmer Haney, deceased, who died on December 21, 1939, and that J. M. Kurn and Frank A. Thompson are the duly appointing and acting trustees of the St. Louis-San Francisco Railway Company, debtor, a corporation operating a railroad as a common carrier by railroad, and that on the 21st day of December, 1939, said Lyman Elmer Haney died leaving surviving him a widow, Julia Haney and Alvin Haney, a son, and Margie Linson, a daughter, children;

You must further find and believe from the evidence that said defendants at said time were operating the St. Louis-San Francisco Railway Company, mentioned in the evi-

dence, as a common carrier by railroad, and as such, was at the time Lyman Elmer Haney was injured and killed engaged in commerce between the state of Alabama and the state of Tennessee, and that said Lyman Elmer Haney at the time he was injured was the servant of said defendants and working and acting within the scope of his employment as such; that said Lyman Elmer Haney and said defendants at the time he was injured were engaged in running and [fol. 164] operating the Frisco passenger train mentioned in the evidence and that said passenger train was on its run from Birmingham, Alabama, to Memphis, Tennessee;

And you must further find that both said defendants and Lyman Elmer Haney at the time he was injured were engaged in interstate commerce."

"Instruction No. 2

"The Court instructs the jury that if you find and believe from the evidence that Lyman Elmer Haney at all the times mentioned in the evidence was an agent and servant of the defendants, J. M. Kurn and Frank A. Thompson working in the line of his duties and within the scope of his employment at the time he was injured and killed;

And if you further find and believe from the evidence that on or about December 21, 1939, said Lyman Elmer Haney while working in the line of his duties as a servant of said defendants in the yards of the Grand Central Depot at Memphis, Tennessee, at the place mentioned in the evidence, opened or lined a switch so that the said defendants could back their passenger train over said switch and into said Grand Central Depot at Memphis, Tennessee;

And if you further find that said Lyman Elmer Haney's duty was to remain at or near said switch and close or reline said switch after the defendants' Frisco passenger train had backed into said Grand Central Station and cleared said switch;

And if you further find that said Lyman Elmer Haney after opening or lining said switch did stand at or near said switch in the clearance of said defendants' Frisco passenger train waiting for defendants' said passenger train to back into said station and clear said switch;

And if you further find that while said Lyman Elmer Haney was so standing at or near said switch and the defendants' passenger train was backing past him

that a rod or other object projecting or swinging out beyond the side of said passenger train struck said Lyman Elmer Haney with great force and violence as defendants' train backed past said Lyman Elmer Haney and did thereby knock him to the ground and injure and kill said Lyman Elmer Haney;

And if you also find and believe from the evidence that the defendants and their servants in charge of and operating said passenger train knew of, or, by the exercise of ordinary care could have known, that a rod or other object was extending, projecting or swinging out beyond the side of said passenger train, if you so find there was a rod or other object extending, projecting or swinging out beyond the side of said passenger train, in time to have removed the same before passing the place where Lyman Elmer Haney was standing;

And if you further find that said defendants knew, or by the exercise of ordinary care could have known that if said rod or other object, if any, was permitted to extend, swing out or project beyond the side of their said passenger train, if any, as it passed said Haney that it was liable to strike and injure Lyman Elmer Haney as said train backed past him, and if you further find that the said defendants knew, or by the exercise of ordinary care could have known of said danger, if any, in time to remove same but negligently failed to remove said rod or other object extending, swinging out or projecting beyond the side of said train, if any, before it passed Lyman Elmer Haney and if you also find that such failure on the part of said defendants, if any, constituted negligence and that as a direct result of such negligence said Lyman Elmer Haney was injured and killed, then you will find for plaintiff and against said defendants, J. M. Kurn and Frank A. Thompson, Trustees for the St. Louis-San Francisco Railway Company, debtor."

[fol. 166]

"Instruction No. 3

The Court instructs the jury that before you can find a verdict for plaintiff and against defendant, Illinois Central Railroad, under instruction No. 4 given you herein, you must first find and believe from the evidence that Walter A. Lavender is now the duly appointed, qualified and acting administrator de bonis non of the estate of Lyman Elmer Haney, deceased, who died on December 21, 1939, and that

the Illinois Central Railroad is a corporation operating a railroad as a common carrier by railroad, and that on the 21st day of December, 1939, said Lyman Elmer Haney died leaving surviving him a widow, Julia Haney, and Alvin Haney, a son, and Margie Linson, a daughter, children;

You must further find and believe from the evidence that said defendant at said time was operating the Illinois Central Railroad Company, mentioned in the evidence, as a common carrier by railroad, and as such, was at the time Lyman Elmer Haney was injured and killed engaged in commerce between the state of Alabama and the state of Tennessee, and that said Lyman Elmer Haney at the time he was injured was the servant of said defendant and working and acting within the scope of his employment as such; that said Lyman Elmer Haney and said defendant at the time he was injured were engaged in running and operating the Frisco passenger train mentioned in the evidence and that said passenger train was on its run from Birmingham, Alabama, to Memphis, Tennessee;

And you must further find that both said defendant and Lyman Elmer Haney at the time he was injured were engaged in interstate commerce."

"Instruction No. 4

The Court instructs the jury that if you find and believe from the evidence that Lyman Elmer Haney at all the times mentioned in the evidence was an agent and servant of the [fol. 167] defendant, Illinois Central Railroad Company, working in the line of his duties and within the scope of his employment at the time he was injured and killed, then the Court instructs the jury that it became and was the duty of the defendant, Illinois Central Railroad Company, to exercise ordinary care to furnish Lyman Elmer Haney a reasonably safe place in which to do the work required of said Haney as the servant of said Illinois Central Railroad and to exercise ordinary care to keep and maintain the place where Lyman Elmer Haney was so required to work reasonably safe;

And if you further find and believe from the evidence that on or about December 21, 1939, said Lyman Elmer Haney, while working in the line of his duties as a servant of defendant, Illinois Central Railroad Company, in the railroad yards at Memphis, Tennessee, at the place men-

tioned in the evidence, opened or lined a switch so that a Frisco passenger train could be backed over the switch into the Grand Central depot at Memphis, Tennessee;

And if you further find that said Lyman Elmer Haney's duties as a servant of the Illinois Central Railroad Company required that he remain at or near said switch and close or reline said switch after the said Frisco passenger train had backed into said Grand Central depot and cleared said switch;

And if you further find and believe from the evidence that at the place where said Haney was required to work, if you so find, the ground was high and uneven and the light was insufficient and inadequate, and if you find that said condition, if any, of the place where Haney was required to work was by reason thereof unsafe and dangerous, if you so find, and that the defendant, Illinois Central Railroad, and its servants failed to exercise ordinary care to make said place reasonably safe, and if you also find and believe that such failure on the part of defendant, Illinois Central Railroad, if any, constituted negligence; and that [fol. 168] said Lyman Elmer Haney was injured and killed as a direct result of said place being unsafe and dangerous, if any, then you will find for the plaintiff and against the defendant, Illinois Central Railroad."

"Instruction No. 5

The jury are instructed that you are the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you may take into consideration the manner of the witness on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all the other facts and circumstances given in evidence. In this connection you are further instructed that if you believe that any witness has knowingly or wilfully sworn falsely to any fact or facts material to the issues in this case, you are at liberty to reject all or any portion of such witness' testimony."

"Instruction No. 8

The Court instructs the jury that if you find for the plaintiff under the other instructions given you, you will

assess the damages in such sum as you may find and believe from the evidence is the present cash value of the future pecuniary benefit, if any, of which the widow, Julia Haney, is deprived by the death of Lyman Elmer Haney, according to the circumstances in evidence, making adequate allowance for the earning power of money, the sum you assess as damages being the aggregate amount of such sums as you may find such beneficiary is deprived, as herein set out."

To which action of the Court in so giving and reading to the jury the said instructions, and each of them, the defendants, and each of them, by their counsel, then and there duly excepted, and still continues to except.

[fol. 169] DEFENDANTS' GIVEN INSTRUCTIONS

Thereupon the defendants Illinois Central Railroad and J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Company, Debtor, presented to the Court in writing and prayed the Court to give and read to the jury, and the Court did give and read to the jury, instructions in words and figures as follows, to-wit:

"Instruction No. 6

If the jury find from the evidence that after Haney threw the switch which permitted Frisco train No. 106 while backing to the east to leave the main track and go onto the switch track leading to the station in Memphis, he crossed over from the north side of said switch track to the south side thereof, and was last seen on that side as the east end of the train passed him, backing toward said station; and if the jury further find that sometime after said train had passed over said switch Haney was found unconscious at a point north of said switch or main track, then plaintiff is not entitled to recover, and your verdict must be in favor of both defendants."

The Court then gave to the jury, at the request of the defendant Illinois Central Railroad Company the following instruction No. 7:

"Instruction No. 7

If the jury find from the evidence that the deceased Haney was employed by the Yazoo & Mississippi Valley

Railroad Company and not by the Illinois Central Railroad Company, then the plaintiff is not entitled to recover against the defendant Illinois Central Railroad Company and your verdict must be in favor of said defendant."

[fol. 170] INSTRUCTION GIVEN BY THE COURT OF ITS OWN
MOTION

Thereupon the Court, of its own motion, gave and read to the jury an instruction in words and figures as follows:

"The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number but as many as nine, agree upon a verdict, the same should be returned as the verdict of the Jury, in which event all of the Jurors who concur in such verdict shall sign the same.

If, however, all of the Jurors concur in a verdict, your foreman alone may sign it."

DEFENDANT ILLINOIS CENTRAL INSTRUCTION REFUSED

Thereupon the defendant, Illinois Central Railroad Company, presented to the Court, in writing, and prayed the Court to give and read to the jury Instructions A and D in words and figures as follows:

"A. If the jury finds from the evidence that the place where Haney was fatally injured was not on any property of the Illinois Central Railroad Company, then plaintiff is not entitled to recover against the defendant, Illinois Central Railroad Company, and your verdict must be in favor of said defendant."

"D. The Court instructs the jury that the defendant Illinois Central Railroad Company owed no duty to the deceased Haney to furnish any light at the place where he was injured, and, therefore, the jury cannot find against said defendant on account of failure to furnish light at said place."

Which said instructions, marked A and D, respectively, the Court refused to give to the jury.

[fol. 171] To which action of the Court in so refusing to give said instructions and each of them to the jury, the defendant Illinois Central Railroad Company, by its counsel, then and there duly excepted and continues to except.

DEFENDANTS' INSTRUCTION REFUSED

Thereupon the defendants, and each of them, presented to the Court in writing and prayed the Court to give and read to the jury an instruction marked "Instruction No. C," in words and figures as follows:

"Instruction No. C

The Court instructs the jury that all of the testimony given by the witness John J. Draschman, both in his deposition and on the witness stand before you, to the effect that someone said, near the scene of the accident to Haney, that Haney had been hit by something sticking out of the side of the train, or that such person thought Haney had been so hit, or that Haney was supposed to have been so hit, is hereby withdrawn from your consideration, and you must not consider any such statement or statements in arriving at your verdict."

Which said instruction the Court refused to give.

To which action of the Court, in so refusing to give and read to the jury the said instruction, the defendants, and each of them, by their counsel, then and there duly excepted and still continue to except.

VERDICT

Thereafter, to-wit, on the 3rd day of March, A. D. 1944, the jury returned into Court its verdict in said cause, in words and figures as follows:

[fol. 172] IN THE CIRCUIT COURT, CITY OF ST. LOUIS, DIVISION No. 9

No. 45112-C

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmer Haney, deceased, Plaintiff,

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY, debtor, and Illinois Central Railroad Company, a corporation, Defendants

We, the jury in the above entitled cause, find the issues joined in favor of the plaintiff and against all of the de-

fendants, and we assess plaintiff's damages in the sum of 30,000.00 Dollars.

(Signed) Canice T. Rice, Foreman.

Which said verdict, together with the instructions, was by the Court ordered filed.

DEFENDANTS' MOTIONS FOR A NEW TRIAL

And thereafter, to-wit, on the 7th day of March, A. D. 1944, at the said February Term of the said Court, and within four days after the rendition of the said verdict as aforesaid, the defendant Illinois Central Railroad filed its Motion for a New Trial in words and figures as follows (omitting caption):

"Comes now Illinois Central Railroad Co., one of the defendants in the above entitled cause, appearing for itself alone, and respectfully moves the Court to set aside the [fol. 173] verdict of the jury rendered in the above entitled cause and to grant this defendant a new trial of said cause for the reasons following, to-wit:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is against the law and the evidence.
4. The verdict is against the wrong party, being against this defendant when it should have been against the plaintiff and in favor of this defendant.
5. The Court erred in overruling this defendant's demurrer to the evidence at the close of all the evidence offered by the plaintiff.
6. The Court erred in overruling this defendant's demurrer to the evidence offered at the close of all the evidence in the case.
7. The Court erred in refusing to give this defendant's requested instruction peremptorily directing the jury to return a verdict in favor of this defendant offered at the close of all the evidence in the case.
8. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.
9. The Court erred in admitting hearsay evidence offered by the plaintiff and admitted by the Court.

10. The Court erred in refusing to admit competent, relevant and material evidence offered by this defendant and excluded by the Court.

11. The Court erred in giving each and every instruction offered by the plaintiff and given by the Court.

12. The Court erred in giving each and every instruction offered by the plaintiff, modified by the Court and given in modified form.

[fol. 174] 13. The Court erred in giving each and every instruction given by the Court of its own motion.

14. The Court erred in refusing to give each and every instruction offered by this defendant and refused by the Court.

15. The Court erred in modifying each and every instruction offered by this defendant and given by the Court in modified form.

16. The Court erred in overruling this defendant's motions to strike out incompetent, irrelevant, immaterial and hearsay evidence which motions were offered by this defendant and overruled by the Court.

17. The Court erred in overruling this defendant's motions to discharge the jury and order a mistrial of this cause, which were made by this defendant and overruled by the Court.

18. The verdict of the jury is excessive.

19. The damages assessed by the jury in their verdict are so excessive that they show that the verdict was prompted by bias, prejudice, passion or mistake on the part of the jurors.

Wherefore, this defendant moves the Court to grant it a new trial of said cause.

(Signed) Watts & Gentry.

And thereafter, to-wit, on the 7th day of March, A. D. 1944, at the said February Term of the said court, and within four days after the rendition of said verdict as aforesaid, the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, filed their Motion for a New Trial in words and figures as follows (omitting caption):

[fol. 175] "Come now defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor, separate and apart from their codefendant herein, and move the Court to set aside the verdict and judgment returned and rendered in the above-entitled cause on March 3, 1944, and grant these defendants a new trial herein for the following reasons:

1. Because the Court erred in admitting, over the objections and exceptions of these defendants at the time, incompetent, irrelevant, immaterial and prejudicial evidence on the part of plaintiff.

2. Because the Court erred in excluding, over the objections and exceptions of these defendants at the time, competent, relevant and material evidence offered by these defendants.

3. Because the Court erred in overruling the demurrer to the evidence interposed by these defendants at the close of the evidence on behalf of plaintiff.

4. Because the Court erred in refusing to give the peremptory instruction in the nature of a demurrer to the evidence requested by these defendants at the close of all the evidence in the case.

5. Because the Court erred in giving, at the instance and on behalf of plaintiff, instructions, and each of them, numbered 1, 2, 5 and 8 in the series of instructions given by the Court.

6. Because the Court erred in refusing to give instruction lettered "C" requested by these defendants.

7. Because the verdict is against the weight of the evidence.

8. Because the verdict is against the law.

[fol. 176] 9. Because the verdict is against the law under the evidence.

10. Because the verdict is grossly excessive.

11. Because the verdict of the jury is so grossly excessive as to indicate that said verdict is, and because said verdict is, the result of passion, bias, and prejudice on the

part of the jury against these defendants and of favor, sympathy and partiality for plaintiff.

(Signed) A. P. Stewart, C. H. Skinker, Jr., Attorneys for Defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, 1025 Frisco Building, Phone Chestnut 7800."

ORDER OVERRULING MOTIONS FOR NEW TRIAL

And thereafter, to-wit, on the 24th day of April, A. D. 1944, and at the April Term of said court, to which said term said cause had by the Court been continued, the Court now being fully advised in the premises overruled said Motions for a New Trial of the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, and of the Illinois Central Railroad Company.

To which action of the Court in so overruling their said motions for a new trial the defendants, and each of them, by their counsel, then and there duly excepted, and still continue to except.

AFFIDAVITS FOR APPEAL

And thereafter, to-wit, on the 15th day of May, A. D. 1944, defendant Illinois Central Railroad filed its Affidavit for Appeal in said cause, in due and proper form.

[fol. 177] And thereafter, to-wit, on the 19th day of May, A. D. 1944, at said April Term of said court, the defendants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, filed their Affidavit for Appeal in said cause, in due and proper form.

And on the 15th day of May, A. D. 1944, by an order duly made and entered of record in said cause, the Court granted the defendant, Illinois Central Railroad Company, an appeal in said cause to the Supreme Court of the State of Missouri and allowed defendant, Illinois Central Railroad Company, ninety days to file its Bill of Exceptions.

And on the 19th day of May, A. D. 1944, by an order duly made and entered of record in said cause, the Court granted the defendants, J. M. Kurn and Frank A. Thompson, Trustees of the St. Louis-San Francisco Railway Com-

pany, debtor, an appeal in said cause to the Supreme Court of the State of Missouri.

BILL OF EXCEPTIONS FILED

And now, inasmuch as the foregoing matters and things, objections, rulings and exceptions, do not appear of record in said cause, and in order that the same may appear of record and be preserved on the appeal of said cause to the Supreme Court of the State of Missouri, the defendants, Illinois Central Railroad Company, and J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, debtor, now tender this their joint Bill [fol. 178] of Exceptions in said cause, and pray that the same may be signed, sealed, settled, allowed, filed, and made a part of the record herein.

All of which is hereby accordingly done, this 27th day of November, A. D., 1944.

Joseph J. Ward, Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division No. 9 thereof, during the trial of this cause. F. E. Williams, Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division No. 9.

Approved: Watts & Gentry, Attorneys for Illinois Central Railroad. M. G. Roberts, E. G. Nahler, A. P. Stewart, C. H. Skinker, Jr., Attorneys for J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor. N. Murry Edwards, Attorney for Plaintiff.

[fols. 179-184] The above and foregoing is respectfully submitted by all of the appellants as and for their joint abstract in lieu of full record in the above-entitled cause.

M. G. Roberts, E. G. Nahler, C. H. Skinker, Jr., Frisco Building, St. Louis, Missouri, Attorneys for Appellants, J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor. Watts & Gentry, Louderman Building, St. Louis, Missouri, Attorneys for Appellant Illinois Central Railroad Company.

John W. Freels, 135 E. Eleventh Place, Chicago, Illinois, Of Counsel for Appellant, Illinois Central Railroad Company.

[fol. 185] And thereafter and on the 13th day of April, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KURN, ET AL., Appellants

Comes now the respondent, by attorney, and files additional abstract of record, with service copy, in the above-entitled cause.

Which said additional abstract of record is in words and figures following, to-wit:

[fols. 186-189] IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, MAY TERM, 1945

No. 39,172

WALTER A. LAVENDER, Administrator d. b. n. of the Estate of
L. E. Haney, Deceased, (Plaintiff) Respondent,

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, (Defendants) Appellants

Appeal from the Circuit Court of the City of St. Louis, Mo.,
Division No. 9, Honorable Joseph J. Ward, Judge

Respondent's Additional Abstract of the Record—Filed
April 13, 1945

Comes now respondent in the above entitled cause and states that the Appellants' Joint Abstract of the Record is imperfect, incomplete, erroneous and incorrect. It narates the evidence and testimony, excludes, misquotes and omits a great part of the evidence on material issues in this appeal. Respondent is not satisfied with Appellants' Joint Abstract of the Record, and therefore tenders this, [fol. 190] his Additional Abstract of the Record, in this case. All of the evidence hereinafter set out was admitted at the trial. We set out and copy certain exhibits admitted in evidence at the trial in full and we quote from the Bill of Exceptions giving the pages on which the evidence or testimony appears in the Bill of Exceptions as hereinafter mentioned.

BILL OF EXCEPTIONS

Plaintiff's Exhibit 4, admitted in evidence (App. Joint Abs. pp. 14-19 and 102) is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT 4

41652

This Agreement, Made and entered into this Twenty-seventh day of March, A. D. 1934, by and between the Illinois Central Railroad Company, party of the first part,

hereinafter for convenience referred to as the Central Company, and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, party of the second part, hereinafter for convenience referred to as the Trustees, Witnesseth:

Whereas, the Central Company is the owner of and in possession of a passenger terminal in the City of Memphis, Tennessee, commonly known as "Grand Central Station", which the Trustees desire to use jointly with the Central Company and its tenants;

Now, Therefore, it is mutually understood and agreed as follows:

1. The Central Company hereby grants to the Trustees the right to use jointly with the Central Company and such other tenants as the Central Company shall have admitted, or may hereafter admit, to the use thereof, its aforesaid [fol. 191] passenger terminal, consisting of tracks, platforms, that part of its station building devoted to the accommodation of passengers, sale of tickets and checking of baggage, together with concourse and stairways leading to station platforms, joint mail terminal and such other facilities and appurtenances now or hereafter provided by the Central Company for the joint use of its tenant companies in the conduct and handling of passenger, express and mail business, the lands, premises and buildings embraced within said passenger terminal being shown in tinted red on the print hereto attached, while the tracks of said passenger terminal are shown by solid red lines on said print; and for convenience all such tracks and facilities shall hereinafter be referred to as the "Passenger Terminal."

[Page 1]

Said Passenger Terminal shall be used by the Trustees only for the arrival, loading, unloading and departure of their passenger trains (which term shall be deemed to include any engine, train or car) of the Trustees. The trains, engines and cars of the Trustees shall remain within the Passenger Terminal only for a reasonable length of time to permit the loading, unloading and necessary switching of such trains, engines and cars of the Trustees.

The Trustees shall have the right to switch with their own engines, their passenger trains and cars upon the

tracks of said Passenger Terminal to the extent necessary to handle and conduct their business, and to switch their passenger trains and cars with their own engines to and from the tracks of said Passenger Terminal from and to the passenger storage and cleaning yard of the Trustees.

The Central Company agrees to furnish, without cost, space for the lockers of the Trustees' train and enginemen in the locker room provided by the Central Company in the station building for its own employes, also space wherein [fol. 192] the Trustees may store a small supply of ice for their passenger cars.

The Central Company agrees to switch through cars from the trains of one party hereto to the trains of the other party at said Passenger Terminal, but no extra or additional charge shall be made against the Trustees for such service.

2. The Central Company shall, at its own cost, maintain and keep in repair all buildings, structures, tracks and appurtenances constituting said Passenger Terminal; furnish the services of its employes for the selling of tickets for the Trustees, loading and unloading their passengers and handling their baggage, including milk and cream handled in cans as baggage; mail and express business; watering and icing their passenger cars; telegraph and telephone service required for the operation of their trains in and out of the Passenger Terminal and the transaction of their business at said Passenger Terminal, and shall operate said Passenger Terminal in such manner as to reasonably accommodate the business of the Trustees.

[Page 2]

The Trustees shall furnish, at their own cost, all tickets, baggage checks and printed forms required for handling and reporting of their business.

3. The Trustees accept the grant herein and agree to use said Passenger Terminal for all their passenger trains arriving at and departing from, and the handling of their passenger traffic at, Memphis, Tennessee, for and during the term of this agreement, and they accept said Passenger Terminal in the condition and state of repair in which same is now in and as the same shall be maintained from time to time hereafter by the Central Company; provided, that if

said Passenger Terminal, or any part thereof, shall become defective and the Central Company shall fail to repair such [fol. 193] defect, and such failure shall continue for a period of fifteen (15) days after notice from the Trustees that such defect exists and that repairs be made to remedy such defect, then at the expiration of said fifteen (15) day period the Trustees shall have the right to make the repairs necessary to remedy such defect, at the expense of the Central Company.

4. The Trustees agree to pay to the Central Company monthly within twenty (20) days after receipt of bill, the sum of One Dollar and Eighty-seven and one-half cents (\$1.87½) for each car in the passenger trains of the Trustees arriving at or departing from said Passenger Terminal.

Motor or other self-propelled car, with or without trailer, shall be deemed as a train, and said rate per car shall apply to motor or self-propelled cars and trailers, but said rate shall not apply to motor or self-propelled cars when passengers, baggage or mail are not carried on or in such cars and such cars are being used solely as motive power for trailers.

No charge shall be made for locomotives, business or official cars of Trustees arriving at or departing from said Passenger Terminal, or for cars moved from said Passenger Terminal to the storage and cleaning yards of the Trustees after being unloaded, or for cars moved to said Passenger Terminal from said storage and cleaning yards of the Trustees for loading.

[Page 3]

5. It is understood that the rate herein to be paid by the Trustees for the use of the Passenger Terminal does not include inspection or repair of the engines, trains or equipment of the Trustees, the switching of cars of the Trustees, excepting cars in through service, the cleaning of cars of the Trustees or the furnishing of supplies to cars or locomotives of the Trustees. Permission is hereby granted to the Trustees to arrange with their own employees for proper and necessary inspection and emergency repair of their locomotives and equipment while their engines and cars may be upon the tracks of the Passenger

Terminal, and for such purpose the employes of the Trustees shall be allowed to go upon the premises of said Passenger Terminal. No charge will be made against the Trustees for water taken from the Central Company's water supply in supplying water to the Trustees' cars.

In cases of emergency, and upon request of the Trustees, the Central Company will perform or render services for and furnish supplies to the Trustees at the following rates:

(a) For labor for inspection or light repairs, at actual cost plus ten percent (10%) for supervision and accounting.

(b) For materials and supplies furnished cars and locomotives, except fuel, sand and water, actual cost f. o. b. Passenger Terminal plus ten percent (10%) to cover handling and accounting.

(c) For each tank of water furnished Trustees' locomotives, One Dollar (\$1.00).

(d) For coal furnished locomotives, at charge per ton equal to sum of price f. o. b. Passenger Terminal, plus 25¢ per ton for handling and use of coaling facilities.

(e) For each locomotive supplied with sand, twenty-five cents (25¢).

(f) For each passenger car cleaned, except diners, private cars and Pullman cars, One Dollar (\$1.00). Diners, private cars and Pullman cars will be cleaned at rates agreed upon in advance of work.

[Page 4]

(g) For ice furnished—[to be charged on same basis as (b)].

[fol. 195] (h) For heating cars with steam, thirty cents (30¢) per car per day or fractional part thereof.

(i) For any switching service performed, Ten Dollars (\$10.00) per engine hour for the time engaged in such service.

6. The management of the Passenger Terminal shall be under the control and jurisdiction of the Central Company, and all employes of the Trustees while in or about said

Passenger Terminal shall abide by and conform to the rules and regulations of the Central Company now or hereafter in effect with respect to the conduct of the business and affairs at said Passenger Terminal and the movement and operation of trains into and out of said Terminal.

7. In case any of the locomotives, cars or trains of the Trustees shall be wrecked or derailed while upon any tracks of the Passenger Terminal, the same shall be rerailed or picked up and removed by the Central Company, and the cost thereof, including the cost of repairing or renewing the track and/or facilities damaged in such derailment or wreck, except as herein otherwise provided, shall be borne and paid by the Trustees. If a wrecker be required to clear such wreck or derailment, Trustee shall furnish such wrecker promptly. Should Trustees fail to do so, Central Company will provide a wrecker, and, except as herein otherwise provided, the cost and expense of such wrecker, whether furnished by Trustees or by Central Company for Trustees, shall be borne and paid by Trustees.

8. For the purpose of determining liability:

(a) The Central Company's employees in said Passenger Terminal while engaged in performing any service for the sole benefit of one of the parties hereto shall be deemed the sole employees of such party:

(b) The Central Company's employees while engaged in performing or rendering any services solely for the [fol. 196] Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the sole employees of the Trustees.

(c) Locomotives while used in rendering any switching service solely for the Trustees pursuant to the provisions of the second paragraph of Section 5 hereof, shall be deemed the separate equipment and sole property of the Trustees.

[Page 5]

(d) Any and all baggage, mail or express brought by the Trustees to or onto the Passenger Terminal at any time for delivery there to any consignee, shall be deemed in possession of the Trustees until safely unloaded in a suitable place within the Passenger Ter-

minal, and thereafter until delivered to such consignee shall be deemed in the possession of the Central Company.

(e) Any and all baggage, mail or express delivered at the Passenger Terminal for transportation therefrom by the Trustees, shall be deemed in possession of the Central Company until delivery by the Central Company on the train of the Trustees on which the same is to depart from the Passenger Terminal.

(f) Each passenger or patron while at or on the Passenger Terminal for the purpose of leaving on a train of the Trustees, or transacting business with the Trustees solely, shall be deemed the exclusive passenger or patron of the Trustees; otherwise such person shall be deemed the exclusive passenger or patron of the Central Company.

(g) Passengers and their baggage arriving at or departing from the Passenger Terminal, while within the Passenger Terminal, shall be deemed to be in the care and custody of the Trustees in case such passengers and baggage arrive or are destined to depart, as the case may be, in the Trustees' train; otherwise such passengers and their baggage shall be deemed to be in the care and custody of the Central Company.

[fol. 197] (h) Any passenger traveling on through ticket and transferring at the Passenger Terminal from a train of any railway carrier (including the Trustee) to a train of another of such carriers, shall be deemed the passenger of the receiving party when he shall have alighted safely from a car in the train of the party conveying him to the Passenger Terminal, and any such passenger, when not the Trustees' passenger within the intention of this sub-paragraph (h) shall be deemed, for the purpose of this agreement, to be the passenger of the Central Company.

9. Each party shall assume and bear all liability for death of or injury to any person or persons whomsoever, or damage to any property whatsoever, including all loss, cost and expenses incurred by the other party, when due solely to the acts, omissions or negligence of any of its sole employees, or the defective condition of its engines, cars or trains.

Each party shall assume equal liability for death of or injury to any person whomsoever, any damage to any property whatsoever, or any loss, cost or expense, when due to the concurrent acts, omissions or negligence of the sole employes of both parties hereto, except that each party shall assume and bear all liability for death of or injury to its sole employes, persons and patrons in its care, and

[Page 6]

damage to its property, and property in its custody, and any loss, cost and expense relating or applying to its own business.

Each party shall assume all liability for death of or injury to its sole employes, passengers and patrons in its care, damage to its property and property in its custody, and any loss, cost and expense with respect to its own business, due to the acts, omissions or negligence of third persons, the condition or state of repair of said Passenger [fol. 198] Terminal, or any part thereof, unknown or concealed causes making it impossible to determine the responsibility, an Act of God, or fire the origin of which shall be unaccounted for; provided, that in case of the derailment of the engines, cars or trains of either party hereto, due to any of the causes in this paragraph mentioned, the party whose engine, train or car or cars was or were thus derailed, shall also assume liability for death of or injury to persons and damage to property not in its employ, care or custody, growing out of or attributable to such derailment.

The Central Company shall be bound to use only reasonable and ordinary care, skill and diligence in the maintenance, repair and renewal of the tracks and facilities constituting said Passenger Terminal, and the Trustees shall, and hereby agree to, indemnify and save harmless the Central Company from any liability, loss, damage or injury incurred or sustained by the Trustees by reason of any defect in any such tracks or facilities, or any part thereof, or the condition or state of repair in which the same may be maintained at any time, or from time to time, anything herein to the contrary notwithstanding.

Neither party shall have any claim or right of action against the other party for any liability, loss or damage incurred or sustained by it by reason of any delay suffered

by any of its engines, trains or cars, or its traffic, while upon or within the Passenger Terminal, however caused, and whether or not due to the negligence of the other party, its agents or employes.

• [Page 7]

Receipts from business of Trustees handled at said Passenger Terminal shall be accounted for as directed by them, and neither party hereto shall be liable to the other party for loss or embezzlement of its funds through the acts, [fol. 199] omissions or negligence of any employes of the Central Company at said Passenger Terminal. In case of embezzlement, theft or loss of any such money by any such employes, the amount of cash on hand at the time of embezzlement, theft or loss, when investigation is made to determine the amount, shall be apportioned between the parties hereto on the basis of the amount due each, such amount to be determined by the parties' joint audit of the accounts of such employes. The Trustees may, at their own expense, bond such employes for such sum or sums as the Trustees deem necessary to protect their own interest.

Each party covenants and agrees with the other party that it will pay for all loss, damage and expense, both as to persons and property, liability for which it has herein assumed, the judgment of any court to the contrary notwithstanding; and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claim therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto.

In case of death of or injury to persons, damage to property, for which the parties hereto are jointly responsible under the liability section of this agreement, the Central Company may make settlement in such case by voluntary payment of money or other valuable consideration. In any such settlement, release from liability shall be taken in the names of both parties hereto. The Central Company, however, shall not make any such compromise or settlement in excess of the sum of Five Hundred Dollars (\$500.00) without the written authority of the Trustees, but any settlement made by the Central Company in consideration of said sum or a lesser sum shall be binding upon the Trustees.

[fol. 200] Neither party shall, however, be concluded by any judgment or decree at law or in equity against the other party hereto unless it has had reasonable notice from such other party requiring it to appear in the action or suit and make defense thereto for its own account or jointly with the other party. If such notice shall have been given by one party hereto to the other party and the party receiving such notice shall have failed to appear and make defense it shall be concluded by the judgment or decree in such suit.

10. The Trustees shall indemnify and save harmless the Central Company from any liability incurred by it, or any fine or penalty imposed upon it, for or by reason of any failure on the part of the Trustees to comply with any law, ordinance or regulation of competent public authority governing or pertaining to the condition or state of repair of their engines, cars and trains, safety appliances thereon, or the manner of operating their trains or the handling of passengers and traffic thereon.

11. If default shall be made by the Trustees in any of the payments herein agreed to be made by them and such default shall continue for sixty (60) days after the amount payable became due, or if the Trustees shall fail to keep and perform any covenant and stipulation on their part to be performed, and such default shall continue for sixty (60) days after demand in writing shall have been made by the Central Company that such covenant or stipulation be performed, then and in such case, and although no action may have been taken on account of any previous default or defaults, the right of the Trustees to the use and enjoyment of the rights and privileges herein granted to them shall, at the election of the Central Company, but not otherwise, at once cease and determine, and the Trustees shall upon such election having been made and written notice [fol. 201] thereof to them given, be excluded from the use and enjoyment of the rights and privileges herein granted.

12. This agreement shall take effect as of January 1, 1932, and subject to the provisions of Section 11 and subject to termination as hereinafter in the next succeeding paragraph hereof provided, shall continue in force until

terminated by either of the parties hereto giving to the other party six (6) months' written notice of intention to so terminate this contract.

Unless sooner terminated as hereinbefore provided, this agreement shall ipso facto terminate as to the Trustees, their successor trustee or trustees, upon the date that possession of the railroad and property of said St. Louis-San Francisco Railway Company, Debtor, by the Trustees, or their successor trustee or trustees, shall cease. If this agreement be in force when such possession by Trustees, or their successor trustee or trustees, shall cease, it shall thereupon become, and, subject to the terms and provisions hereof, thereafter continue in force as an agreement between said Central Company, its successors or assigns, as first party, and St. Louis-San Francisco Railway Company, its successors or assigns, as second party, provided said St. Louis-San Francisco Railway Company, its successors or assigns, shall by written notice to Central Company, its successors or assigns, elect to adopt same.

13. It is understood and acknowledged that the effectiveness of this contract is dependent upon the Trustees securing the approval thereof by the Interstate Commerce Commission, and that until such approval is secured, this contract shall not be binding on the parties hereto. The Trustees agree that they will, without unnecessary delay and due diligence, proceed to secure such approval.

[fol. 202] In Witness Whereof, the parties hereto have executed this agreement in duplicate, the day and year first above written.

Illinois Central Railroad Company, by William Atwill, Vice President & General Manager. J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, by H. L. Worman, Chief Operating Officer.

[Page 10]

41652

May 23, 1934.

DEAR MR. WORMAN:

I have your letter of May 16th, file 890-8, enclosing contract under which your Company will continue the use of our station facilities at Memphis. The changes made on pages 2, 4 and 5 of the contract, by reason of eliminating

the charge in sub-paragraph (g) of Section 5 for labor to water and ice your cars, are satisfactory, except with the following understanding, and it is with such understanding that I have executed the contract on behalf of the Illinois Central:

That the obligation on the part of the Illinois Central to furnish the services of its employes to water and ice your passenger cars as stipulated in the first paragraph of Article 2, on page 2 of the contract, applies only to passenger cars in the trains of your Company operating through Memphis, and that it is not the intention that this Company will furnish labor for watering and icing passenger cars in trains of your Company originating or terminating at Memphis, but that all such cars, except possibly [fol. 203] in cases of emergency, will be iced and watered in your coach yard before their arrival at the station.

And with the further understanding that above mentioned obligation shall not be construed as requiring this Company to furnish labor or ice for icing cars or machines for air conditioning purposes, if and when your Company should undertake to air condition its cars at Memphis.

I shall be pleased to have you acknowledge your acquiescence to the foregoing understanding, so that I may file a copy of this letter and your reply with our copy of the contract.

As to your request for ten copies of the contract, I will submit these just as soon as we can have them prepared.

Yours very truly, (Sgd.) W. Atwill, Vice Prest. & Gen. Mgr.

cc—Mr. Bunting, Mr. Quigley, Mr. Holcomb.

41652

St. Louis-San Francisco Railway Company

J. M. Kurn and John G. Lonsdale, Trustees

St. Louis, May 28, 1934.

890-8

Mr. W. Atwill, VP&GM, Illinois Central System, Chicago, Ill.

DEAR MR. ATWILL:

This will acknowledge receipt of executed counterpart of agreement between the Illinois Central and Frisco Trustees

dated March 27, 1934, covering our use of your passenger [fol. 204] station facilities at Memphis, received with your letter 23rd, file 67-182, in which you set forth the understanding in respect to services to be rendered in watering and icing our through passenger cars, which is satisfactory.

Application will be filed by us promptly with the Interstate Commerce Commission for its approval.

Yours very truly, H. L. Worman, Chief Operating Officer.

E. L. GATES, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Witness E. L. Gates testified, Bill of Ex. pp. 25 to 28:)

Q. Do you know anything more about this injury than you have told me—I mean the injury to Mr. Haney?

A. No, nothing more than he was wearing a white cap and it was new or practically new, it had not become soiled, and I looked at the cap, and at a point about where my finger is there (indicating).

Q. You are pointing to the back of your head?

A. Yes. (Continuing) Was a black dirty spot on the cap, on the outside.

Q. No blood on the inside?

A. No, sir, no blood stains, but just a black spot. And I was told later that that corresponded with the location of the injury on his head.

Q. On the back of his head?

A. Yes, sir.

Q. This cap you speak of was a white cap, was it?

A. Yes, sir.

Q. And this black spot that you have described on this [fol. 205] cap was on the outside and on the back of the cap?

A. Yes.

Q. Did you indicate a little to your right?

A. A little to the right of the center of the head.

Q. A little to the right of the center of the head?

A. A little lower than the crown.

Q. And a little lower than the crown of the head?

A. Yes.

Q. About the top of the ear?

A. Well, possibly just a little above the top of the ear.

Q. Possibly a little above the top of the ear?

A. Yes, sir.

Q. Could you describe a little better this cap, this black spot on the cap, how large it was?

A. It was about the width of my finger and possibly an inch and a half long.

Q. About the width of your finger, and your finger is about a half inch thick, isn't it?

A. Possibly so.

Q. And about two inches long?

A. An inch and a half, something like that.

Q. About an inch and half long?

A. Yes.

Q. And did that run horizontal across the cap?

A. I don't recall now just the exact manner, but it seemed like there was bars across down this way, that it struck not across, but kind of at an angle, downward like.

Q. Did anyone else look at that cap besides yourself?

A. I showed it to someone there, but I don't recall who it was.

Q. Did you see any pistol or any weapon around there?

A. No, sir.

Q. Did you see Mr. Haney's lantern around there?

A. Well, I don't know, there were several men there with lanterns and I don't know that it was his lantern. If I saw it I didn't recognize it as being his.

Q. And did you see any spot of blood around there?

A. No, sir.

Q. And did you see any instrument, any pipes or any clubs or anything lying around there?

A. No, sir.

[fol. 206] Q. Were there any lights around there that shone on this place?

A. You mean street lights or something like that?

Q. Yes, electric lights of some kind?

A. No, there was no lights there and none near there.

Q. Has there been any light erected there since?

A. Yes, there has been lights put up since then.

Q. And where?

A. Right near this spot where he was killed.

Q. That light wasn't there at the time he was killed?

A. No.

Q. This light that has been erected since, does that shine on or near this switch, the Frisco switch?

A. Yes, it is near the switch.

Cross-examination.

By Mr. Skinker:

(Witness E. L. Gates testified again, Bill of Ex. p. 34:)

Q. The overhang of an ordinary passenger train is, roughly, two to two and a half feet, isn't it, somewhere in that neighborhood, the overhang of the train?

A. Yes, sir.

Mr. Edwards: You mean to the side of the rail?

Mr. Skinker: Yes.

By Mr. Skinker:

Q. It extends beyond the rail?

A. Yes, it would be about, I guess, twenty-four to thirty inches.

Q. Twenty-four to thirty inches?

A. Yes.

Q. That the engine and cars extend north of the north rail?

A. Yes.

(Witness E. L. Gates testified again, Bill of Ex. pp. 36 and 37:)

By Mr. Skinker:

Q. Now I understood you to say in answer to a question from Mr. Edwards that you observed a black or dark spot [fol. 207] on the back, sort of the right-hand side of the white cap which Mr. Haney was wearing at the time? That is correct, isn't it?

A. Yes.

Q. Just describe that spot there, about how long, how wide, and so on, did it appear?

A. Well, as well as I can recall, possibly half an inch wide or maybe a little wider, and about an inch and a half long, as well as I can recall.

Q. Was it sort of in the rounded part of the cap, in the rear, where the cap fits the contour of the back of the head?

A. Well, it looked like it might have been at a place just off of the center of the head, if you draw a line down.

Q. A little to the right?

A. To the right and a little below the center of the head, but I would say above the ear.

Q. Would you say it was sort of a mark there that looked like it had been made by some blunt object such as a pipe or club or something of that sort striking against there? Did it have that appearance to you?

A. Well, it—it's where I think something struck it; just what and where and how I couldn't say, just what it was; but it was something come in contact there, in my opinion.

Q. And it left those dark marks on the cap that you describe?

A. Yes, sir.

Mr. Edwards: On the outside of his cap?

Mr. Skinker: On the outside.

The Witness: On the outside.

Mr. Edwards: And in the back?

The Witness: In the back.

Redirect examination of Witness Gates.

By Mr. Edwards:

(Bill of Ex. pp. 48-51)

Q. Just a question or two, Mr. Gates. After this train on this occasion, on the 21st day of December, 1939, passed you, backing into the station, the train backing east and then turning north—wasn't it?

A. Yes.

[fol. 208] Q. Now after it passed you on that occasion, this train, just before you found Mr. Haney, did you stand and watch the train for some distance, back?

A. It would not have been my custom to have done that, and I don't recall on this specific date whether I did or whether I did not; but it would not have been my custom to watch it beyond the clearing of my switch.

Q. And that would be how far east of where you were standing, would you watch it customarily?

A. Well, just as soon as he would clear my switch, just as soon as he would get by, to where I could reline my switch to its normal position.

Q. When you say reline the switch after the train, I take it, the engine, had backed east of you?

A. Yes. After the engine had backed off of the switch.

Q. What did you have to do to reline that switch after the engine had backed on east of where you were?

A. Just go to the switch stand and throw the switch lever over.

Q. And when you throw it over, what do you do, throw it which way? You turn it, don't you?

A. Yes.

Q. A lever or handle there?

A. Yes.

Q. That lever is about two or three feet long, is it?

A. Two feet long, I would say.

Q. And has some weight on the end of it, does it?

A. Yes, there is a heavy ball on the end of it.

Q. A heavy ball of metal, isn't it?

A. Yes.

Q. And you turn that which way to open it to let the train back in?

A. Well, it just depends on the set-up of the switch; this particular switch I couldn't tell you whether I would throw it to the right or to the left, off-handed I couldn't—

Q. Did you get—well, go ahead.

A. I say, I couldn't recall whether the switch was moved to the right or the left.

[fol. 209] Q. You don't recall whether you threw it to the north or to the south?

A. That is right.

Q. It does turn, that switch lever that you have described, to the north and down to the ground, and then turns back to the south and down to the ground?

A. No, it works the opposite, it works parallel with the tracks.

Q. Oh, does it?

A. Yes.

Q. It works parallel with the tracks?

A. Yes.

Q. It turns over to the west or to the east?

A. That is right.

Q. Now, you don't recall which way it turns to open the switch when the train comes in?

A. No, they will have a switch in there, maybe you will turn it eastward for your main line movement, and maybe the next switch you would turn, it would turn just the opposite.

Q. On this occasion with this train that backed in, just before they found Mr. Haney, you threw this switch that you are talking about, your switch, one way or the other as the train pulled west, didn't you?

A. Yes, I threw it one way or the other to make it line up, but just which way I moved that lever, I don't recall, I don't recall how it looked up.

Q. I understand. Was it necessary for you to throw that switch that you have described before that train, that engine, passed you going west, on that occasion?

A. Yes.

Q. It was necessary?

A. Yes.

Q. And after that train had backed east and north into that station, your next duty was to line or close that switch, wasn't it?

A. That is right.

Q. And you did that on this occasion?

A. Yes, sir.

Q. Now, when you closed that switch, after the engine had backed east of you, did you look on east to where the train was backing to?

A. No, not after it had cleared my switch. I had completed my duty in the handling of that particular train."

[fol. 210] (Deposition pp. 54-55, Witness Gates testified, further:)

Q. When you walked east, when you received a message that Mr. Haney had been injured, what distance could you see, as you walked on that occasion?

A. Well, it was dark; there is a street light right there where I work, right on that corner, and there is no more street lights between there and Haney's office. At Florida street there is a subway and what street light they have is underneath the subway. At Main street there is a subway—that is the next corner.

Q. As you walked east on that occasion, after you had received a message Mr. Haney had been injured, how

close did you come to these parties at this switch where Mr. Haney was found, before you saw them?

A. How close to the parties standing around there?

Q. Standing around there, how close were you to them when you first saw them?

A. Oh, I don't know. I walked on down to where they were.

Q. Did you see them, do you think, when you were within fifty feet of them?

A. Now, I wouldn't think so, because it was after night.

WALTER ORA BUNDY, being duly sworn, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Bill of Ex. pp. 64-65, Witness Bundy testified:)

Q. Where was his cap, did you notice?

A. Laying out a little to the right of his head, if I remember right.

Q. A little to the right of his head, which would be between his head and the tracks?

A. Yes, sir.

Q. Yes. And what kind of a cap was it?

A. A white cap.

[fol. 211] Q. Did you notice anything about the cap, any marks on it of any kind?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you examine it?

A. No, sir.

Q. Carefully.

A. No, sir.

Q. You didn't?

A. No, sir.

Q. There might have been marks on it that you didn't see?

A. I didn't see, and in fact, I didn't notice it.

Q. You didn't notice it. Now, did you look around there on the ground to see if there had been any struggle?

A. No, sir.

Q. Did you see any evidence of any struggle around where Mr. Haney's body was lying?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Did you see any club or pipe?

A. No, sir.

Q. (Continuing) Or weapon of any kind?

A. No, sir.

Q. Did you see any pistol laying around there?

A. Under his body.

Q. Under Mr. Haney's body?

A. Yes, sir.

Q. Now, if I understand you, he was lying face down?

A. Yes, sir.

(Witness Bundy testified at pp. 66 to 70 in Bill of Ex.):

Q. Before you turned him over did you see anything on Mr. Haney's back, or his head, that indicated he had been struck and injured?

A. Yes, sir.

Q. On the back of the head?

A. Yes, sir.

Q. Where did you see that?

A. Right on the back of his head, right up there (indicating).

Q. Right on the back of his head?

A. Yes, sir.

Q. And you indicated the right back of his head?

A. Yes, sir, right back in there (indicating).

Q. What did you see back there?

A. A gash about two inches long, I would say it was two inches long.

Q. Was that bleeding?

A. Yes, sir.

[fol. 212] Q. And did you see any other injury on him besides this injury you have described?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You say you turned him over?

A. Yes, sir.

Q. Who was present when you turned him over?

A. Mr. Claude Bruso.

Q. Claude Bruso and yourself?

A. Yes, sir.

Q. Now, before you turned him over did you see his lantern or a pistol there?

A. No, sir.

Q. After you turned Mr. Haney over did you see a pistol or a lantern?

A. Yes, sir.

Q. And where was the pistol or lantern?

A. Under his body.

Q. Under his body?

A. Yes, sir.

Q. Was the pistol in his hand?

A. No, sir.

Q. Or just lying under his body?

A. Just laying there.

Q. Laying under his body?

A. When we turned him over the pistol come in view.

Q. Did it appear that the pistol had fallen out of his pocket or out of his hand, or just did it appear and—

A. It just appeared there.

Q. And indicated it might have—

A. It indicated it might have slipped out of his pocket.

Q. You would say it slipped out of his pocket?

A. Might have, I say.

Q. Probably did?

A. Yes.

Q. And his lantern, was that in his hand, did you notice?

A. No, I don't know, I don't know whether it was in his hand or not; it was laying on the ground, that is all I know.

Q. Mr. Haney's clothing, were they disrupted in any way, to indicate a struggle?

A. No, sir.

Q. They were not?

A. No, sir.

[fol. 213] Q. His head was pointing, as you say, south-east?

A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north?

A. Yes, sir.

Q. Into the station?

A. Yes, sir.

Q. Now, did you notice that switch there close to where Mr. Haney's body was found?

A. Yes, sir.

Q. Was that open or closed when you and Mr. Bruso arrived there?

A. It was open.

Q. It was open?

A. Yes, sir.

Q. And by that, it wasn't lined?

A. No.

Q. Now, I believe, the next duty of Mr. Haney was to close that?

A. Yes, sir.

Q. I believe you know that, I suppose, do you?

A. Yes, sir.

Q. You know, as a switch tender?

A. Yes, sir.

Q. And you know about what he does there, don't you?

A. Yes.

Q. So that, this switch there, close to Mr. Haney's body, this Frisco switch, was not closed and relined when you got there?

A. No, sir.

Q. Now, they say there is a red light of some kind shows until that is closed, is that true?

A. It shows red when it is throwed to back the train around the wye, and green when it is lined, as we call it, for the main line.

Q. That is what I mean. If Mr. Haney had relined that switch and closed it, would it then have automatically showed green? Is that right?

A. Yes, sir; yes, sir.

Q. Where is that light? Tell me.

A. It is right in what we call a lamp.

Q. Is it in that switch there?

A. It is in a lamp that sets on the switch stand, it is a casting of metal, and there is a bulb in that cup in there with oil.

Q. You indicate it is about three inches in diameter or more?

A. More.

Q. About three inches in diameter?

A. Yes, sir.

[fol. 214] Q. And that is right on that Frisco switch there close to Mr. Haney's body?

A. Yes, sir.

Q. And as you approached you noticed that red?

A. Yes, sir.

Q. And if he would have thrown that switch it would have automatically turned green?

A. Yes, sir.

Q. In other words, when you throw that switch you don't have to turn the light to make it green?

A. No, sir.

(Witness Bundy testified further at p. 73 in Bill of Ex.:)

Q. And how long would you say, Mr. Bundy, that you and Mr. Bruso remained there where you found Mr. Haney, where you turned him over on that occasion?

A. Well, the two of us didn't remain there very long, I wouldn't say—not over five minutes, if I remember right.

Q. You and Mr. Bruso?

A. Yes.

Q. And what did you do after that time?

A. He went and called the ambulance, I believe.

Q. Mr. Bruso did?

A. Yes.

(Witness Bundy also testified at p. 74 in Bill of Ex.:)

Q. And outside of this lick in the back of the head that you described, when you held him up in your arms, did you notice anything else about him?

A. No, sir.

Q. About his face, was his face skinned up?

A. It was bruised from hitting the ground.

Q. That is what I am getting at.

A. Yes, sir.

Q. His face appeared to be bruised from hitting the ground face down?

A. Yes, sir.

Q. And can you give me a little better description of the condition of the face, what part of his face was—you indicated the cheek there?

A. I believe it would be the left side.

Q. The left side?

A. Yes.

[fol. 215] Q. And on his cheek bone of his face, do you think?

A. Down along this way (indicating).

Q. Were there cinders in his face?

A. Yes, sir.

(Witness Bundy testified at p. 75, in Bill of Ex.:)

Q. How soon did the ambulance come to take Mr. Haney's body away?

A. I don't know how long it was. I thought it was a long while myself, because the position I was sitting in I was getting very much cramped there, and I didn't want to lay his head down on the ground until they come there. I don't suppose, though, it was over ten or twelve minutes.

Q. You held his head for some time, then, did you—several minutes?

A. I held his head until the ambulance arrived there.

Q. Oh, you did?

A. Yes, sir.

(Witness Bundy testified at p. 76, also in Bill of Ex.:)

Q. When you turned him did you just turn him over or carry him some distance?

A. We turned him over to the left.

Q. Turned him over to the north?

A. And turned him around.

Q. To the north and east?

A. Yes, sir.

Q. And you say you turned him around?

A. Yes, sir.

Q. And how did you turn him, which direction did you turn his head?

A. North.

Q. Turned his head more to the north?

A. Yes, sir.

Q. Did you turn him so that his head was pointing more north than east?

A. I believe it was; yes, sir.

Q. And you did that, I guess, when you first turned him over?

A. Yes.

Q. You and Mr. Bruso?

A. Yes, sir.

[fol. 216] Cross-examination of Witness Bundy.

By Mr. Skinker:

(Bill of Ex. p. 82.)

Q. How far was his head north of the north rail of the track?

A. I would say about five feet, five foot and a half.

Q. And then his feet were something like five feet or so on north of that?

A. Yes, sir.

Q. From his appearance did he appear to have fallen forward or backward?

A. Forward.

EDWIN ARNOLD.

Direct examination.

By Mr. Edwards.

(Bill of Ex. p. 84.)

Q. Will you give us your name in full?

A. Sam Edwin Arnold.

Q. And where do you live, Mr. Arnold?

A. 1075 University street, Memphis.

Q. Memphis, Tennessee?

A. Memphis, Tennessee.

Q. How old are you, Mr. Arnold?

A. Thirty.

Q. What is your business?

A. Switch tender.

Q. Switch tender for who?

A. Illinois Central Railroad.

Q. Often referred to as the I. C. Railroad?

A. Yes, sir.

Q. How long have you been a switch tender for the Illinois Central Railroad?

A. Four and a half years.

Q. Were you working as such switch tender in December, 1939?

A. Yes, sir.

Q. What were your hours of work at that time?

A. 2:30 p. m. to 10:30 p. m.

Q. Where were you stationed?

A. Grand Central Station.

Q. And did you have any particular place you were working on December 21, 1939?

A. I was working at the south end of the station, at Carolina street.

[fol. 217] Q. Is that close to where Lyman Haney was working?

A. Yes, sir.

Q. Were you working out of the same shanty that he worked out of?

A. No, sir.

Q. Which direction was your shanty located from Haney's shanty?

A. North.

Q. North. And you were at Carolina street, weren't you, that is, one block north, is it?

A. Yes, sir.

Q. What were your duties in December, 1939, as switch tender, Mr. Arnold?

A. Well, I was putting trains in and out of Grand Central Station, handling switches.

Q. Just give me an idea what your duties would be, what you did all night.

A. Well, I handle the switches to let the trains in and out of Grand Central Station, that is about all I can give you.

(Witness Arnold testified in Bill of Ex. at p. 90:)

Q. You couldn't tell me. Did you see evidence where Haney had bled, on the ground there close to the switch some place?

A. I did.

Q. You did. And where was that?

A. It was about eight or ten feet from the switch.

Q. Was that close to where Bundy was holding his head?

A. It was.

Q. And by close to it, you mean within a foot of where he was holding him?

A. I would say it was a foot or two away, yes, sir.

Q. You would say the blood was within a foot or two of where Bundy was holding Haney's head at that time?

A. That is it; yes, sir.

Q. Would you say the blood was between Mr. Haney's head and the Frisco tracks?

A. Yes, sir.

Q. It was?

A. Yes, sir.

[fol. 218]—(Witness Arnold testified in Bill of Ex. at pp. 92 to 95:)

Q. You knew of Haney's duties, to throw this switch and open it so that the Frisco train could back in, didn't you?

A. Yes, sir.

Q. What would be Mr. Haney's next duty after that Frisco train had backed in?

A. Close the switch.

Q. Close the switch?

A. Yes, sir.

Q. That was to close it immediately, would it be?

A. Yes, sir.

Q. Have you thrown similar switches to this, where you saw Mr. Haney's body there—on the Frisco?

A. Yes, sir.

Q. And you have done that continuously for three or four years, haven't you?

A. Yes, sir.

Q. When you throw these switches, you raise a lever and throw it over, don't you, from one side to the other?

A. Yes, sir.

Q. Now, when you throw a lever like that to open it, to let a train back in, such as the Frisco, in a place similar to where Haney was found, what is your next duty? What do you do then?

A. I just throw it over and latch it.

Q. Latch it, fasten it?

A. There is a latch on it; yes, sir.

Q. Then what do you do—or what did you do then?

A. Well, we give a signal for the train to back in.

Q. You give a signal for the train to back in?

A. Give a signal to the train, to the conductor or—

Q. Who do you give that signal to?

A. Well, it is according to whether the train is backing up or coming forward. Backing up it would be the conductor.

Q. It would be the conductor. And what kind of a signal would that be? Can you describe it a little better with your words, for me?

A. Well, just a round signal with your lamp.

Q. Round signal with your lantern?

A. That is right.

Q. And would you ever give such a signal as that to [fol. 219] the engineer?

A. No, sir—yes, you would if he would be backing up, you would.

Q. If he would be backing up you would give it to the engineer?

A. Yes, sir.

Q. And then after giving such a signal to back up—that is a signal to back up you are talking about?

A. Yes, sir.

Q. You would give such a signal after you have thrown the switch and opened it?

A. Yes, sir.

Q. Then what would you next do?

A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean?

A. Yes, sir.

Q. And when the train backed up then next what would you do?

A. Close the switch.

Q. Close the switch. Would you wait for some time after it backed in, or close it just as soon as it had cleared?

A. Close it as soon as it cleared.

Q. Just as soon as the engine backed in you would close the switch?

A. Yes, sir.

Q. Then you would go to your next duty?

A. Yes, sir.

Q. You have done that for the three or four years?

A. Yes, sir.

DENMAN M. STUBBS, testified on behalf of plaintiff as follows:

Direct examination.

By Mr. Edwards:

(Bill of Ex. at pp. 107 to 108)

Q. Do you remember seeing him on this occasion, on December 21, 1939, Lyman Haney?

A. Well, it was dark and I couldn't tell who it was; all I could see, as I figured, was the switch tender's light, as he come over from the shanty toward the rear end of our train.

Q. That was there at the cross-over?

A. Yes, sir; just below the cross-over.

[fol. 220] Q. Just below—and when you say just below the cross-over, you mean——

A. Just west.

Q. Just west of the cross-over?

A. Yes, sir.

(Witness STUBBS testified further in Bill of Ex. at pp. 110 to 111:)

Q. And you told me about seeing Mr. Haney come out on that occasion as your train went west over that crossing?

A. I didn't say it was Mr. Haney.

Q. You saw a man come out?

A. That is right.

Q. And you didn't know it was Haney?

A. I couldn't tell. I saw a lantern.

Q. You thought it was the switch tender?

A. I couldn't say who it was; I took for granted it was the switch tender; it was dark and I took for granted——

Q. Because he did that—you saw him do that before?

A. Yes, he come out——

Q. What did he do, this man you saw with the lantern?

A. The last I saw him it looked like he was going to get on the rear end of our train and ride down to the switch, which was west of his shanty.

Q. About two hundred and fifty feet west of his shanty, wasn't it, the switch?

A. Something like that, yes.

(Witness STUBBS also testified in Cross-examination, by Mr. Skinker, Bill of Ex. at pp. 122 to 124:)

Q. Now, at the time you stopped that train how many car lengths north or northeast of this wye switch stand was the rear end of the train?

Mr. Edwards: He said about one hundred feet.

A. The rear end?

By Mr. Skinker:

Q. Yes.

A. From the switch stand—you mean where it was lined up for us to back in?

Q. Yes, the wye switch they call it.

A. I judge it was a train and a half length.

[fol. 221] Q. You mean by that something like fifteen hundred feet?

A. Something like that; yes, sir.

Q. At the time he stopped?

A. From where he stopped.

Q. In other words, the engine had already backed beyond the switch stand?

A. Should have been beyond the switch and should have cleared that switch.

Q. And no part of the train would have been left on the main line, in your judgment?

A. In my judgment he should have had room enough to clear that switch at that time.

Mr. Skinker: That is all.

Redirect examination of Witness Stubbs.

By Mr. Edwards:

Q. Just a question or two. When you told me that the back end of that train stopped about one hundred feet north of the Frisco tracks, was that by signal from you?

A. Yes, sir.

Q. Then you said it stood there with the back end of the train about one hundred feet north of the Frisco tracks?

A. That is right.

Q. Yes. Now, the front end of the train was on west of there, wasn't it?

A. Yes, sir.

Q. I believe the train was about eleven hundred feet long, approximately?

A. Something like that.

Q. From the front of the engine?

A. A thousand feet we would say, anyway.

Q. That is twelve coaches and the engine and tender?

A. Yes.

Q. Then when you gave it a signal to go on, after the train, the rear end of it had stopped about one hundred feet north of the Frisco tracks, you gave it a signal to go on and continue to back up; did it start up immediately from your signal?

A. I think he had to take the slack out of the train to get it started, if I remember correctly, on account of the [fol. 222] heavy grade backing in there; they had already started up part of the grade, the rear end getting back.

Q. That is what I am trying to get at.

A. Yes, sir; he came back.

Q. From the time you gave him a signal, when the rear end of the Frisco train was about one hundred feet north of these Frisco tracks, did it continue to go on in until it went into the station on that occasion?

A. As I remember, we didn't make another stop, we went right on into the station.

The appellants in printing the testimony of witness John Joseph Drashman have reduced the same to the narrative form and in many places the significance, meaning and effect of Drashman's testimony has been changed so that the respondent believes the only way to properly, fully and fairly submit the testimony of witness, John Joseph Drashman given at the trial and the testimony of John Joseph Drashman given in his deposition before the trial filed in the case and offered in evidence at the trial is to print the testimony of Drashman in full given at the trial and to print in full the testimony of Drashman given in the deposition and offered in evidence at the trial.

We, therefore, set out what occurred and took place at the trial before Drashman was placed on the witness stand and at the time respondent offered to read Drashman's deposition in evidence taken from the Bill of Exceptions, pages 126 to 204, inclusive, which is as follows (Bill of Ex. p. 126):

By Mr. Hart: Now, I will read from page 189, John Joseph Drashman. He is offered only against the Frisco, the same as the other depositions.

By the Court: Very well.

[fol. 223] By Mr. Skinker: Mr. Drashman is present in Court, and his deposition is not admissible in direct evidence. Is Mr. Drashman back there?

By Mr. Drashman: Yes, sir.

By Mr. Skinker: And I think there is no question under the statute where the witness is present in Court.

By Mr. Hart: Well, I will put Mr. Drashman on the witness stand, if you insist.

By Mr. Skinker: I don't insist. I just say you can't use the deposition.

By the Court: You may put him on.

By Mr. Hart: Do you mean any of the deposition of the witnesses I have been reading in the courtroom?

By Mr. Skinker: No, sir.

JOHN JOSEPH DRASHMAN, of lawful age, being produced, sworn and examined on the part of the plaintiff, testified as follows, to-wit:

Direct examination.

By Mr. Edwards:

Q. Will you state your name in full?

A. John Joseph Drashman.

Q. Where do you live, Mr. Drashman?

A. Memphis, Tennessee.

Q. By whom are you employed?

A. The Frisco Railroad.

Q. That is the Frisco Trustees, now under trusteeship?

A. Yes, sir.

Q. The defendant in this case?

A. Yes, sir.

Q. Now, how long have you worked for the Frisco Railroad?

A. It was forty years the second day of February.

Q. What do you do for them?

A. My title is coach foreman. I have charge of the passenger equipment, supervising cleaning, repairs—anything in connection with the passenger cars.

[fol. 224] Q. And where are you stationed to perform those duties?

A. Well, in two places, at the Grand Central Station, and the Yale yards.

Q. That is in Memphis, Tennessee?

A. Yes, sir.

Q. When you say "Grand Central Station," do you mean the Grand Central Station yards, as well as the station proper?

A. Anywhere where a Frisco train would be stationed in the yards.

Q. Wherever a Frisco train would be stationed in the yards?

A. Yes, sir.

Q. And that is, passenger trains?

A. Yes, sir.

Q. How long have you had the duties of taking care of the Frisco passenger trains?

(No response.)

Q. Has that been your duty all along?

A. Yes, sir.

Q. Ever since you have been employed by them?

A. Yes, sir.

Q. Are you in charge of that—do you have men working under your supervision now?

A. Yes, sir.

Q. How many men do you have working under your supervision there?

A. I have eighty-six.

Q. Eighty-six?

A. Yes, sir.

Q. And what do those men do generally, those eighty-six?

A. Coach cleaning, repairing coaches, inspecting, and just maintain the passenger equipment.

Q. Maintain the passenger equipment?

A. Yes, sir.

Q. Does that also include mail cars?

A. Yes, sir; that is considered a passenger car.

Q. Does it have anything to do with the engines and tenders?

A. No, sir.

Q. Now, in December, 1939, what were the times of your employment, what time did you go to work, and what time did you quit?

A. Well, I haven't a specified time, I am on a monthly salary, and along that time I was working anywhere from eighteen to twenty hours a day.

[fol. 225] Q. What time did you usually report for duty?

A. I showed up around the Grand Central Station about six-thirty a. m.

Q. And what time did you usually leave your duties?

A. I left the station around about eight-thirty a. m., and go out to the Yale yards. And then I come back down to the station again around a quarter to six, or six o'clock p. m.

Q. In the evening?

A. Yes, sir.

Q. And that is when you usually quit, about that time?

A. No, sir; whenever there is any rush or any extra work I stay there until that is all completed. Around Christmas time I generally stay there until the last train has departed which is around about eleven o'clock, probably later.

Q. Did you know Lyman Elmer Haney?

A. No, sir; I did not. I did not know him personally.

Q. You understand, I mean Lyman Haney, the switch tender that this suit is for his death?

A. Yes, sir.

Q. You understad who I mean?

A. Yes, sir.

Q. You did not know him?

A. No, sir.

Q. Now, on December 21st, 1939, did you receive a report while you were on duty that Haney had been injured, or a switch tender had been injured there at the station or some place?

A. Yes.

Q. And where were you when you received that report?

A. I was over around the gate, between tracks four and five, remember right.

Q. I will show you what has been identified as Plaintiff's Exhibit 4A, and ask you to look at that map, and tell the jury if you recognize that as being a correct drawing of the lay of the station, and the yards, and the switch yards and tracks, at Memphis, Tennessee, at the Grand Central Station?

A. Yes, sir; that is correct.

Q. You have seen maps like this before, I suppose?

A. Yes.

[fol. 226] Q. Of the station there?

A. Yes, sir; that is right.

Q. Now, can you tell me on this map about where Haney's shanty was, his headquarters that he worked out of?

A. Yes, sir; right in here (indicating), in this location right here.

Q. Will you take your pen and make a cross there where Haney's shanty was located?

A. Yes, sir (indicating).

(Clerk here insert Exhibit with X.)

Q. Now, in order to get a description of where you have just made the cross on this exhibit, that is where Haney's shanty was stationed, wasn't it?

A. Yes, sir.

Q. Where you have just made the cross?

A. Yes, sir; I think that is the right location.

Q. Now, so the jury will understand it, is this cross that you made north or south of the Frisco main line that runs in east to west?

A. It is south.

Q. You mean that the shanty is south?

A. No, sir; the shanty is north of the main line.

Q. That is what I understand, yes.

A. Yes, sir.

Q. The shanty is north of the main line, and what is this line running straight in just west of where you have made the mark, what lines are these that are running into the station?

A. Well, there is several tracks in there, that is what is called the Illinois Central tracks into the depot.

Q. That is what I understood.

A. Yes, sir.

(Objection and argument omitted.)

Q. Now, will you make a cross and mark a "2" on it where the switch was that Haney threw, and that the Frisco backed in on, where you found him, I understand, afterwards—make the cross for that switch.

A. Well, I will tell you this is out of my line, I am no mechanic.

Q. I am just asking you for the lay of the ground.

A. I don't know anything about these tracks, that is not my job.

[fol. 227] Q. I am not asking you to give me the construction of the tracks, I am asking you where this switch was from the shanty, point it out on the map.

A. I couldn't tell you.

Q. Well, which direction was it from the shanty, which direction was the switch where his body was found, from it?

A. It is west.

Q. West?

A. Yes, sir.

Q. Well, this map, the way I am holding it, this portion is west, and this is east and this is north, and this is south, those are the directions. Now, with that explanation can you show me where that switch is located, from the point that you have made there, the shanty?

A. If I remember right, it is right over here, according to this drawing; and this drawing looks like it is just the reverse from where the tracks are in the yards.

Q. Well, you say that the switch where Haney's body was found is west of where his shanty was located, is that right?

A. Yes, sir.

Q. How far west?

A. Well, I should say it is round about one hundred feet from the shanty.

Q. About a hundred feet west, you say?

A. Yes, sir.

Q. And about straight west, isn't it?

A. No, sir; it is kind-of northwest.

Q. Northwest?

A. Yes, sir.

Q. Who did Haney work for?

A. I don't know.

Q. Had you seen Haney before the time of his death?

A. I knew him afterwards, that it was Haney, I did not know the man's name, I had seen him working around there.

Q. How long had you seen him working around there?

A. Well—

Q. (Interrupting) For what space of time before his death?

A. I have no recollection, I didn't pay any attention.

Q. Been regularly for years, several years?

[fol. 228] A. I couldn't say. I see switchmen working around there every day and every night. I didn't pay any attention to them. I know their faces, but I don't know them by name.

Q. About what time was it that you learned of Haney's injury on the night of December—

A. (Interrupting) Around about seven-forty p. m.

Q. And you told me where you were, and about how far were you when you learned of Haney's injury, from where he was injured?

A. I should judge about a half a mile.

Q. And what did you do when you learned of that, did you go to the scene of where Haney's body was found?

A. Our superintendent of terminals came through the gate and wanted me to go with him, and that is what I did.

Q. Well, you went there, didn't you?

A. Yes, sir.

Q. Now, where did you go to?

A. Right straight down the track south from where I was standing.

Q. Went south?

A. Yes, sir.

Q. And where did you find Haney's body?

A. The body had been moved when we got there.

Q. The body had been moved?

A. Yes, sir.

Q. Didn't you see the body?

A. No, sir.

Q. You testified in your deposition that you saw the body, didn't you?

A. No.

Q. Do you remember when your deposition was taken in this case?

A. Yes, sir.

Q. I will ask you if you do not recall these questions being asked you when your deposition was taken, and you giving these answers:

"Q. Were you in the vicinity of where he was injured on December 21, 1939? A. I went down there right after I heard that there was an accident there."

Do you remember testifying to that?

A. Yes, sir.

"Q. And where were you when you heard there was an accident? A. Up around the Stationmaster's office." Do you remember testifying to that, and is that right?

A. I don't remember. I imagine so, if it is that way. [fol. 229] "Q. What did you find when you got down there and where did you go? A. Well, I went down to the switch tender's shanty there."

A. Yes, sir.

Q. Do you remember testifying to that?

A. Yes, sir.

"Q. You went to Haney's switch tender's shanty? A. Yes. Q. And did you go to a switch nearby, where his body was? A. Well I don't think his body was by any switch. It was between the switch stand and——." Do you remember testifying to that?

A. No, sir; I do not.

Q. You don't remember testifying to that?

A. No, sir.

"Q. Well, did you see Haney's body down there? A. Yes." Do you remember testifying to that?

A. No.

Q. Well, do you remember when this deposition was taken?

A. I remember you had me down in the office asking me a lot of questions, but I don't remember stating anything like that.

Q. Don't you remember testifying on May 1st, 1941? Don't you remember testifying on May 1st, in this case?

A. I don't remember the dates. I remember you had me in your office.

Q. Well, Mr. Skinker was there in the office, wasn't he, and he asked you questions, too, didn't he?

A. I don't remember whether he was there or not now.

Q. You don't remember that?

A. No, sir.

Q. Well, then, this question could have been asked you, and you have forgotten it, is that true?

A. Well, it could be; yes, sir.

Q. Before you testified in this case you held up your hand and swore to tell the truth and the whole truth?

A. Yes, sir; that is what I am doing now.

Q. And you tried to tell the truth when you gave this deposition?

A. As far as I can remember, I tried to tell the truth about it.

Q. (Reading) "Q. Well, did you see Haney's body down there? A. Yes. Q. And how far was it from the Frisco [fol. 230] switch, from the main line? A. I don't know, I didn't measure it. Q. Well, how far was it from the Frisco tracks? A. I did not measure that." Do you remember testifying to that?

A. No, I do not.

Q. Is that true?

A. Which?

Q. What I have just read.

A. No, sir; it is not.

Q. It is not true that you looked at the body?

A. No, sir; I did not see the body.

Q. "Q. What would be your best judgment? A. About six feet." Do you remember testifying to that?

A. No.

Q. Did you testify to that?

A. No, I did not.

Q. All right. "Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body." Do you remember swearing to that?

A. Are you sure that is my deposition?

Q. There is no question about it. You can look if you want to look at it. There is your name on the page before that, it says on page 189 "John Joseph Drashman, of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says on the part of the plaintiff as follows: Direct Examination by Mr. Edwards." Do you remember being sworn?

A. Yes.

Q. Now, the next question: "Q. What would be your best judgment?" That refers to where the body was. "A. About six feet." That was from the Frisco tracks, about six feet. "Q. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well,

I think the whole body." Do you remember swearing to that?

A. No.

Q. Would you say that you did testify to that, or that you did not?

A. I did not.

Q. The next question: "Q. The whole body. And which way was Haney's body pointing when you first saw it? [fol. 231] A. I believe it was west." Do you remember testifying to that?

A. No, sir.

Q. "Q. Pointed west. And was he lying on his back or on his face or side or how? A. On his face, if I remember right." Do you remember testifying to that?

A. No. The only thing I testified to is as to the location where the body was supposed to have been.

Q. All right, just listen: "Q. Lying on his face? A. Yes. Q. With his back up? A. Yes. Q. And you think his head was faced west? A. Yes. Q. Are you sure about that? A. No, I am not sure. I think it was. Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it." Do you remember testifying to that?

A. No.

Q. Is your memory a blank on what you gave?

A. No, sir; I don't think so.

Q. Very well, I will read the next one: "Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it. Q. He might have faced east, then? A. Yes, could have been. Q. I see. Who was there when you arrived where you found Mr. Haney, as you say? A. Well, Mr. Young and I went down together, our superintendent of the terminals." Did you testify to that?

A. Yes, we went down together.

Q. Do you remember testifying to that in this deposition?

A. We went together; yes, sir.

Q. All right, but do you remember testifying to that?

A. Yes, sir.

Q. You do?

A. Yes, sir; I do.

Q. Now, that is true in the deposition, isn't it?

A. That is true there; yes, sir.

Q. "Q. And who was there when you arrived there? A. Well, I don't know, there were several parties there, and I think this I. C. switch engine foreman, Brusco, he was [fol. 232] there, and I think there were several of the city plainclothes men were there." Do you remember testifying to that?

A. Yes, sir.

Q. And that is true?

A. Yes, sir; that is true.

Q. "Q. These men were there when you got there, that you are speaking of? A. Yes."

(Objection and argument omitted.)

Q. Mr. Drashman, who have you been talking to about this since this deposition has been given?

A. Well, I have not been talking to anyone. I had forgotten about the case all together. And I am trying to tell you that I do not remember ever stating that I saw the body, which I did not. I did tell you that I saw the location where the body was supposed to have been.

By Mr. Edwards: Well, you have told me that, these questions that I have read to you, that you do not remember, and now you say that you did not hear about this case, or have not talked to anybody about it since the time this deposition was given, until recently?

A. Until the last day or two, yesterday to be exact.

Q. Recently who have you talked to about this case?

A. Well, Mr. Skinker had me in his office yesterday.

Q. Did you go over the case with him yesterday?

A. Not all of the way through; no sir.

Q. Did you discuss what you were going to testify to here in Court?

A. No, sir; he told me he wanted me to get up and tell the truth just to the best of my recollection, and that is what I am trying to do.

Q. Is that all he told you?

A. Yes, sir.

Q. And that is all you and he talked about?

A. Yes, sir.

Q. Well, I will ask you more of these questions: "Q. Did you notice anything about Haney's head or body that indicated he had been injured? A. Well, I saw what looked to me like a hole knocked in the back of his head,

like someone had struck him with a blunt instrument of [fol. 233] some kind." Did you testify to that in your deposition?

A. No, sir.

Q. Is that true?

A. I don't know.

Q. I say, is this true, what I have read?

A. True in what way?

Q. What I read, is that true?

A. I didn't make any such statement as that to you.

Q. You say then what I have read to you is not true?

A. No, as far as my statement is concerned; no, sir.

Q. And you do not remember testifying to it?

A. No, sir; I do not.

Q. "Q. What kind of a wound was that on the back of Haney's head? A. Well, it looked like a caved-in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something." Do you remember testifying to that?

A. No, sir.

Q. "Q. Could that have been made with a round pipe?

A. Well, it could have been, yes. Q. Did you see Haney's

face? A. No. Q. Was he turned over so you could look

at his face? A. Not while I was there. Q. How long did

you remain there? A. Well, I imagine about three min-

utes." Do you remember testifying to that?

A. You had me mixed up with someone else.

Q. I am just reading from your deposition. Do you remember that?

A. I do not.

Q. And is that true, what I have just read?

A. No, sir.

Q. It is not true?

A. No, sir.

Q. "Q. And then did you ever return to the place? A.

Yes, after the body was moved. Q. Oh, after they moved

the body. Did you see any blood around there where—

close there? A. Yes, there was a spot of blood about six

inches across." Do you remember testifying to that?

A. I saw that; yes, sir.

Q. And is that true?

A. Yes, sir.

Q. Now, at the bottom of page 193, Mr. Skinker, about [fol. 234] the middle of the page. "Q. Now, which way from

this switch did you notice this blood, east or west of this switch? A. It was south, south of the rail, I don't know how close to the switch." Did you testify to that?

A. I imagine I did, if you say so.

Q. No, I am just asking you, you are the man, you are the man testifying, I am not testifying. Did you testify to what I have just read?

A. I know what distance it was, about; yes, sir.

Q. Well, is that true, what I have read?

A. Yes, sir.

Q. And did you so testify?

A. I don't remember that part of it. I don't think I testified to any of that stuff you have there.

Q. Don't let me interrupt you. If you want to explain anything go ahead. "Q. How close was that blood to his body? A. That was after his body was removed? Q. How is that? A. That was after his body was removed that I saw the blood."

A. That is right.

Q. You testified to that?

A. That is correct.

Q. "Q. Did you see any blood there while the body was there? A. No. Q. You didn't? A. No, not except on his head there." Do you remember testifying to that?

A. No.

Q. "Q. You did not? A. No, not except on his head there. Q. When did you return there after the body was removed? The next day? A. No, the same night. Q. That night? Did anybody return with you? A. Yes. Q. Who was that? A. Mr. Young and I were down there together."

A. That is right.

Q. You remember testifying to that?

A. Yes, sir.

Q. "Q. Is there a mound north of the Frisco tracks there at the switch? A. Well, there may be what you call a mound; there is a pile of dirt piled up there. Q. And where is this pile of dirt with reference to the switch, which way from it? A. I don't know. Q. Do you know how high that mound of dirt is? A. Well, I imagine about [fol. 235] two feet above the rail. Q. About two feet above the rail. And about how long does that extend along there? A. Oh, several feet. Q. Does it extend east and west of the switch? A. Both east and west of the tracks, yes." Do you remember testifying to that?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. Did you examine Train No. 106 after Haney was found? A. Yes, sir. Q. Where did you examine it? A. In the station after it was backed in under the shed. Q. In the station? A. Yes, sir. Q. Was that after you heard Haney was killed or hurt? A. After I was down to the scene of the accident I went back. Q. You mean after you had gone down and seen Haney? A. Yes, sir. Q. And you came back? A. Yes." Do you remember testifying to that?

A. No, I remember telling you I came back and made an inspection of the equipment.

Q. Is what I have read true?

A. No, partially it is not.

Q. "Q. You made an inspection, I believe, you just told me, after you had seen Haney's body where he was injured up there? A. Yes." Do you remember testifying to that?

A. I remember telling you I made an inspection of the equipment after I left the scene of the accident, but I did not tell you I saw the body. I never did see the body.

Q. You never did see Haney's body?

A. No, sir.

Q. Not up to this time at all?

A. No, sir.

Q. Then what they have in this deposition, what I have read to you about seeing the body, is not true, is that so?

A. That is right.

Q. And you swear that you did not so testify?

A. Yes, sir.

Q. You swear that you did not so testify in this deposition?

A. I never did tell you that I saw the body at any time.

Q. And these places where I have read in this deposition [fol. 236] tion, where you say you saw the body, that is not true?

A. No, sir; it is not.

Q. And you did not so testify?

A. No, sir; I did not.

Q. Page 198, starting at the bottom of the page—first, did you examine one of the sides of this train more closely than you did the other side of the Frisco train 106?

(Objection and argument omitted.)

By Mr. Skinker: Plaintiff's attorney, Mr. Edwards, in examining the witness, Drashman, in regard to what said witness stated in his deposition in this case, has reached a point in said deposition approximately at the top of page 199 of said deposition. And the defendants want to read page 199 and approximately the first half of page 200, because they deal with matters which should not be read to the jury. And after reading said portion of the deposition, we will then state to your Honor our objections to the reading of such questions and answers in the presence of the jury. Now, beginning at the top of page 199 of said deposition, being part of the deposition of witness Drashman, I will read as follows:

“Q. You examined the fireman's side very close? A. Yes.

Q. And you didn't examine the engineer's side quite so close? A. Not so close, no.

Q. What was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney? A. Yes, sir.

Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

[fol. 237] Q. (By Mr. Edwards.) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there.

Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground? A. Yes, sir.

Q. That is where you heard this statement made? A. Yes, sir.

Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there.

Q. That is what you heard there?

Mr. Skinker: Just a moment, I want to object to that as hearsay and improper and may it go to all similar questions?

By Mr. Edwards: Yes.

Q. (By Mr. Edwards) That was down there when you first went down and saw Haney's body? A. Yes.

Q. You heard someone there where the body was, saying that they thought something sticking out on the train hit him, is that right? A. That is right."

(Objection and argument omitted.)

By Mr. Skinker: I think if your Honor allows this line of objection to be considered in, it will not be necessary for us to repeat the objection.

By the Court: Whichever way you gentlemen want. If you can agree on that, all right, if you can't, we will rule on each question as it is asked. Bring the jury down, Mr. Sheriff.

(The further following proceedings were then had in the presence of the jury.)

[fol. 238] By Mr. Edwards (to witness Drashman): Now, did you examine this train, Frisco passenger train number 106 that came in to the station at Memphis there on the evening of December 21st, 1939, after that train came in?

A. Yes, sir; I made an examination of it.

Q. Did you examine both sides of the train?

A. Yes, sir.

Q. Did you examine that which would be the fireman's side of that train?

A. Yes, sir.

Q. I say, which would be the fireman's that would be the left side, wouldn't it?

A. Yes, sir.

Q. Did you examine the engineer's side of that passenger train?

A. I made an inspection of that train first, and then I went over on the right side, and the car inspector, Armand,

he was making an inspection of what we call the right side, and then he and I went back on the left side again, yes.

Q. Did you particularly examine the left side of that train?

A. No more than I did the right.

Q. Well, I will call your attention to your deposition about that. Listen to these questions and answers, Mr. Drashman. "Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side? A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side. Q. Oh, you particularly examined the firemen's side? A. Yes." Do you remember answering those questions in that manner in your deposition?

A. Yes, you asked me if I made an inspection, and I told you yes.

Q. Well, I have just read to you the last question and answer, "Oh, you particularly examined the fireman's side? A. Yes." Don't you recall testifying to that?

A. I remember telling you I made an inspection of it; yes, sir.

[fol. 239] Q. Don't you remember telling me that you particularly examined the fireman's side?

A. No, sir; I do not.

Q. Well, what I have just read to you, did you so testify in that deposition?

A. I don't remember it if I did.

Q. You may have testified to it?

A. I may have.

Q. Well, is it true, what I have just read to you?

A. That I made an inspection of the train; yes, sir.

Q. What I have read to you, is that true?

A. No.

Q. All right. Now, the next question along that same line: "Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did the engineer's side? A. I looked at that very close." Did you so testify?

A. Yes, sir; I did.

Q. And that is true, is it?

A. Yes, that is it.

Q. Why did you examine one side closer than the other?

A. Do you want me to answer that?

Q. Yes, sir.

By Mr. Skinker: We object to his answering that question, if it deals with any hearsay testimony, or of any matters he may have heard, particularly if it deals with any party's expression or opinion as to what their thought might be as to how the accident occurred.

By Mr. Edwards: I can't anticipate what this witness will say, Mr. Skinker.

By Mr. Skinker: Let me finish; and that such testimony would be hearsay and incompetent, and we therefore object to his going into that question at all.

By Mr. Gentry: I object to that question because it is very evident in view of what is contained in the deposition of this witness to which your Honor's attention has been called, and which Mr. Edwards now has in his hand and is endeavoring to bring out from this witness the same matter in the deposition, to which we have objected, and therefore I object to it because it is evident he is asking the question to get his reason and bring in this hearsay testimony as the reason.

[fol. 240] By Mr. Edwards: I don't think that is evident. I don't think you can anticipate what this witness will say, unless you know.

By Mr. Skinker: May I join in Mr. Gentry's objection, and include that in my own?

The Court: Yes, sir; objection overruled.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted at the time and still continue to except.

(Question read by Reporter: Why did you examine one side closer than the other?)

A. Because I was told by one of the switchmen, I believe, if I remember right, that this man was supposed to have been struck by something protruding on the side of this train.

By Mr. Skinker: Now, we object to that answer, and ask that it be stricken, because it is purely hearsay, and further, because it is not identified as to the person who is supposed to have made the statement, and it deals with an expression or a conclusion on the part of the person who made the statement. There is no showing that the person who made the statement was present or saw what happened. The person who made the statement would be invading the

province of the jury in stating a conclusion of his own, in making the statement, and the answer is wholly improper, and the hearsay testimony should be stricken out.

By Mr. Gentry: We also object to it for the same reasons, and ask that it be stricken.

By Mr. Edwards: I want to ask this witness where he got that information.

By the Witness: Your Honor, could I explain?

By the Court: No, just answer the questions.

By Mr. Skinker: You are overruling my objection?

By the Court: No, are you through?

[fol. 241] By Mr. Edwards: I want to find out where he got that.

By the Court: Are you through with that particular question?

By Mr. Edwards: No, sir; I want to pursue that some more. (To witness) I take it that it was a railroad employee, a brakeman or switchman, is that it, said that?

A. A switchman, I think.

Q. And where did he make that statement to you?

A. Out there on the ground where this man was supposed to have been struck.

Q. Haney?

A. Yes, sir.

Q. Was that when you went down there to where this switch was that Haney had thrown to let the Frisco train in at that time?

A. It was down there in that location; yes, sir.

Q. It was down there at the time you first went down there to investigate when you heard that Haney was hurt?

A. I didn't go down there but one time, but that was the time; yes, sir.

Q. And is that the time?

A. Yes, sir.

Q. Was it made down there at the switch which Haney threw to let this Frisco train in?

A. No, sir; it wasn't at the switch, it was in that location around there, see?

Q. Well now, do you know who this switchman was?

A. I do not.

Q. Could he have been a switchman for the Frisco Railroad?

A. No, sir; I think it was the Illinois Central man, if I remember right, the I. C. man.

Q. When you say "I. C.," do you mean the Illinois Central Railroad?

A. The Illinois Central Railroad; yes, sir.

Q. I will ask one more question, and then you make your foundation. Wasn't this statement made, that you have just stated, down there when you went down there and saw Haney's body lying there at the switch; isn't that true?

A. No, sir.

[fol. 242] By Mr. Edwards: Then, your Honor please, I will ask to read this part of the deposition. Now, if you want to make an objection to the reading of it—

(Objection and argument omitted.)

By Mr. Gentry: I want to renew my objection to it, for the reasons stated.

By Mr. Skinner: The defendant, Frisco, renews its objection for the reasons already stated.

By the Court: Very well, the same ruling.

To which ruling of the Court the defendants, and each of them, by counsel, then and there duly excepted at the time and still continue to except.

By Mr. Edwards: Do you recall testifying to what I will read to you, on page 199? "Q. And you didn't examine the engineer's side quite so close? A. Not so close, no." Do you remember testifying to that?

A. Yes, I do.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Why was that difference? A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man. Q. You mean Haney? A. Yes." Do you remember testifying to that?

A. Yes, sir.

Q. That is true, isn't it?

A. If your Honor would allow me to explain—

By the Court: (Interrupting) Just answer the question.

By Mr. Edwards:

Q. That is true, isn't it?

A. Yes, sir.

Q. The next question: "Q. That is, someone told you that at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened." Did you so testify?

A. Yes.

Q. And that is true, isn't it?

A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir.

[fol. 243] By Mr. Edwards: Explain any answer you want to.

By the Witness: What I was going to do was to explain why I made a closer inspection on one side than the other. It seems like he is stressing very heavily on that.

By Mr. Skinker: May it be understood our objections are renewed to all of these questions with reference to this hearsay testimony, what he heard somebody say?

By the Court: The same ruling.

By Mr. Skinker: And we will not have to make objections every time.

By the Court: Yes, sir; the same ruling.

To which ruling of the Court defendants, by their counsel, and each of them, then and there duly excepted at the time and still continue to except.

By the Witness: I want to go into detail and show why I have to make a closer inspection of one side than the other. If that side is in an accident—

By Mr. Gentry: (Interrupting) I object to going any further on that.

By Mr. Edwards: Do you want to hear what he wants to explain?

By Mr. Skinker: We will object to that.

By Mr. Edwards: All right, we will proceed then. Now, Mr. Skinker, there is a further answer to that same question, where you made an objection.

By Mr. Skinker: Just a moment, we object to that. We object to that answer and ask it be stricken out as purely hearsay, "That is all—I didn't get who it was." That is really part of the other.

By Mr. Gentry: He says, "I didn't get who it was."

By Mr. Edwards: The witness says, "That is all," and Mr. Skinker interrupted the witness, and the witness said, "That is all—I didn't get who it was." You testified to that, didn't you?

A. Yes.

Q. And that is true, isn't it?

A. Yes.

[fol. 244] Q. "Q. (By Mr. Edwards) All right, who told you that, and when? A. I don't know who it was, I just heard them talking around there." "Q. Who did you hear talk and where? A. I don't know who it was, down where Haney's body was laying on the ground." Do you remember testifying to that?

A. No, I didn't mention the body.

Q. And what I have read to you then, you did not testify to?

A. No, sir.

Q. You deny that you testified to that?

A. Yes, sir; in those words that you have; yes sir.

Q. The next question: "Q. Where Haney's body was laying on the ground? A. Yes. Q. That is where you heard this statement made? A. Yes, sir." Do you remember testifying to that?

A. No, sir.

Q. "Q. Somebody said they thought something sticking out on the train hit him, is that right? A. That is what I heard there."

A. That is right.

Q. You testified to that?

A. Yes, sir.

Q. "Q. That is what you heard there." Now, shall I read the objection, Mr. Skinker?

By Mr. Skinker: Yes, sir.

By Mr. Edwards (reading): "Mr. Skinker: Just a moment; I want to object to that as hearsay and improper and may it go to all similar questions? By Mr. Edwards: Yes." Now, the next question: "Q. That was down there when you first went down and saw Haney's body? A. Yes." Do you remember testifying to that?

A. No.

Q. That is when you first went down there, is that true?

A. I did not go down there but one time.

Q. Well, part of that answer is right, isn't it?

A. Yes, sir.

Q. When you first went down there?

A. Yes, sir.

Q. That is where you heard this statement made?

A. Yes, sir.

Q. "Q. You heard someone there where the body was, saying that they thought something sticking out on the [fol. 245] train hit him, is that right? A. That is right." Did you so testify?

A. Yes, sir.

Q. And that is true, isn't it?

A. Yes, sir.

Q. "Q. When you heard that you went back and examined the train? A. That is right." Is that right?

A. That is right.

Q. And you so testified?

A. Yes, sir.

Q. "Q. Now, is it possible, this mail hook could have hit him?" Wait a minute, I did not lay the foundation.

(Objection and argument omitted.)

By Mr. Edwards: All of the matters that I have just asked you about, the statements that you say were made, as I understand, were made down there near that switch that Haney threw to let the Frisco train in?

A. Yes, sir.

By Mr. Edwards: Now, Your Honor, might I offer the excerpts I have read from the deposition of this witness into evidence without re-reading them, as a part of the examination?

By Mr. Skinker: I think they are already in evidence.

By Mr. Edwards: I want that understood. The questions I have read and you have checked me, that they were correctly read and as set out in this deposition.

By Mr. Skinker: Yes, sir; I think so.

By Mr. Edwards: I want to offer those statements in evidence as part of the examination of this witness.

By the Court: The record may so show.

(Clerk will here copy said questions and answers.)

Said questions and answers are hereinabove set out.

By Mr. Edwards (to Witness): Now, this train, Frisco train No. 106, had in it a mail coach, didn't it?

A. Yes, sir; a mail car.

Q. That mail coach was near the engine, wasn't it?

A. Yes, sir.

Q. That mail coach has on it, on the side of it, iron [fol. 246] hooks, mail hooks, doesn't it?

A. We call them mail pouch catchers.

Q. Some people call them mail hooks?

A. Yes, sir.

Q. They are iron, and tell the Jury about what size they are, how large is that round part of that iron?

A. You mean the lower or upper part?

Q. The lower part.

A. About five-eighths of an inch.

Q. About five-eighths of an inch?

A. Yes, sir.

Q. And they are round?

A. Yes, sir; got a little curly tail on the bottom.

Q. And that little curly tail is round, isn't it?

A. Yes, sir.

Q. Now, when the Train 106 is backing, those hooks are pointed—I mean the hook part—is pointed towards the front and towards the engine?

A. It is pointed this way backing up (indicating).

Q. Those hooks are not fastened to the side of the train, are they?

A. Yes, sir; they fasten on a pivot.

Q. They swing loose on the side of the train?

A. No, sir; they do not swing unless you pull them down.

Q. Well, they are not fastened to the side of the train, are they?

A. No, sir.

Q. Now, tell the Jury how far out those hooks swing from the side of that train—how far out can they swing from the side of that train?

A. What do you mean—when they are raised up?

Q. Yes, sir.

A. When the mail clerk inside of the car pulls down on the handle, it raises vertically out. In other words, it sticks out twenty-five inches, two foot and one inch. But you have to pull down on the handle on the inside of the car to swing it out.

Q. Well, some of them swing out about three feet, don't they, from the side of the train?

A. No, sir.

Q. Don't you recall testifying in your deposition, when I asked you about this question: "Q. Did you find this mail coach, on this mail coach, did it have any mail hook [fol. 247] on it? A. Yes, one on each side of the car." Do you remember testifying to that?

A. Yes, sir, that is right.

Q. "Q. One on each side. What kind of a hook is that, can you describe that? A. Yes, it is iron, V-shaped."

A. Yes, sir, that is right.

Q. "Q. And how does that work? A. One side of it is fastened through brackets on each side of the door posts, and the other hangs down against the side of the car, with a handle on top." That is right, isn't it?

A. Yes, sir.

Q. You testified to that, and that is true, isn't it?

A. Yes, sir.

Q. "Q. Can that be extended out to the side of the train? A. Yes." That is right, isn't it?

A. Yes, sir.

Q. "Q. How far out to the side of the train can that mail hook be extended? A. You can swing it out three feet." Isn't that true?

A. No, sir.

Q. Well, do you remember so testifying in this deposition?

A. I don't think I told you three feet, because I know better than that.

Q. All right. "Q. Swing out three feet? A. To the tip end of the hook." Do you remember so testifying?

A. No, sir.

Q. Is that true?

A. No, sir; it is not.

Q. Do you say that you did not testify to what I read?

A. Twenty-six inches, I know that, and I have known that for years.

Q. You did not testify that it swung out three feet?

A. No, sir; I did not tell you that.

Q. They are loose so that you can go along with your hand on the side of the train and raise them up, can't you?

A. With some effort, yes, sir.

Q. Well, it don't take much effort; you can take the tip of your finger and swing them around, can't you?

A. No, sir.

Q. You can't do that?

A. No, sir; there is too much weight to lift that with your finger.

[fol. 248] Q. Do you remember testifying to that on page 206, Mr. Drashman, well it is near the bottom of page 205:

"Q. Isn't it a fact, Mr. Drashman, you can go along and raise these mail hooks up on the side of the train? A.

No, you can't raise them. Q. You can't? A. No. Q. I raised about six of them up last night. A. Probably you

can, you are a little taller than the average man—but how high could you raise them? Q. Oh, raise them up,

taking them all, they are not fastened, they are not fastened down, are they? A. No. Q. These mail hooks are not

fastened down, are they? A. No, sir." Now, do you recall testifying that I could raise them up because I was a little

taller or higher than you?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. Now, there was a mound north of that Frisco track, next to that switch that Haney had just thrown before he was killed, wasn't there?

A. Yes, sir; yes, there is a little raised place there.

Q. Well, that mound was about two feet high, wasn't it?

A. I didn't measure it, I couldn't say.

Q. Well, in your best judgment.

A. It was about eighteen to twenty inches, the best I can say.

Q. Above the rail?

A. Yes, sir.

Q. That mound north of the Frisco tracks?

A. Yes, sir.

Q. It was in that condition the night you went down there after Haney was killed, wasn't it?

A. That is right.

By Mr. Edwards: You may take the witness.

Cross-examination.

By Mr. Skinker:

Q. Mr. Drashman, you were up in the station, were you, this evening, on this particular evening of December 21st, 1939?

A. Yes, sir.

Q. Now, that is four years ago this past December?

A. Yes, sir.

Q. And you recall going down to the scene of the accident, do you?

A. Yes, sir; I recall that.

[fol. 249] Q. And how long were you there?

A. That night?

Q. Yes, at the scene of the accident.

A. Oh, I don't think over fifteen or twenty minutes at the most, maybe not that long.

Q. You were not there a great while, were you?

A. No, sir; not very long.

By Mr. Edwards: I object to the witness' conclusion, he said fifteen or twenty minutes.

By Mr. Skinker: Did you then go back to the station?

A. Yes, sir.

Q. Did you inspect this train yourself, did you go over the train yourself?

A. I started to inspecting one side by myself, and then I met the car inspector.

Q. What was his name?

A. L. J. Armand.

Q. Is he living or dead, Mr. Drashman?

A. No, sir; he is dead.

Q. Was that a routine inspection that Mr. Armand was making, in other words, the car inspector would go over the train when it gets into Memphis?

A. Every night, yes, sir.

Q. Does that inspector look for hot boxes and things of that kind along the side of the train?

A. Yes, sir; for anything, anything that might be defective around the train.

Q. Is that the man you see around passenger stations at night?

A. Yes.

Q. Going along with a lantern and flashing it at the wheels and the sides of the train?

A. Yes, sir.

Q. Armand was there inspecting the train when you got back, was he?

A. Yes, sir.

Q. And did you continue to inspect with him, or did you make a separate inspection?

A. Continued with him, and he and I went back around to the left side of the train.

Q. When there is anyone found in the yards under circumstances like you have described, where there has been [fol. 250] a train gone by, and there is someone there, with any possibility of the train being involved, is it your duty to make an inspection?

A. Yes, sir; we have what we call a Form 171, regular equipment inspection form, that we have to make a report on regardless of whether that train was involved in it or not.

Q. And did you go ahead with that inspection then; yourself, at that time?

A. Armand and I together, we made that inspection, yes, sir, and made out the form together.

Q. Did you observe the sides of the train?

A. Yes, sir.

Q. On both sides?

A. Yes, sir.

Q. Did you observe the mail car?

A. Yes, sir.

Q. Do you recall where the mail car was with reference to the engine?

A. It was right behind the tank.

Q. At the head end?

A. Towards the rear of the engine; yes, sir.

Q. Now, did you find anything on either side of the train in the way of an object protruding out from the side of the train?

A. No, sir.

Q. Any rods, stick or wire or any kind of an object?

A. No, sir; we looked for anything that might be or would be sticking out.

Q. What kind of doors are there on the baggage cars, and what kind on the mail cars?

A. They are sliding doors on the inside of the car, that is, six inches from the outside.

Q. Sliding doors on the inside of the car?

A. Yes, sir; you have to slide them back.

Q. Slide back and forth along the inside wall of the car?

A. Yes, sir.

Q. Now, when you get to the coaches and the Pullman cars, they have what is commonly called a vestibule door?

A. Yes, sir.

Q. And does that open towards the inside?

[fol. 251] A. Yes, sir; door swings towards the inside before you can raise the trap door.

Q. There are no doors on a passenger train that swing towards the outside, are there?

A. No, sir; not on any passenger car.

Q. What is the height of the mail arm above the top of the rails, that is the mail arm, as I understand you, it is on a bracket there, across the door of the car, isn't it?

A. Yes, sir.

Q. And it is worked by the United States postal man on the inside pressing down a handle, and that brings up the mail arm; is that right?

A. No, sir; he has to open the door, you see.

Q. Yes.

A. And then he pulls down on the handle.

Q. He pulls down on the handle on the inside of the car?

A. He has a handle about eighteen inches long on top of this mail pouch catcher. In other words, there is a rod on top that fastens through two brackets on each side of the door posts, and this handle is about twelve inches away from the back post, and he pulls down, and that swings the bottom part of the catcher out.

Q. Do you mean outside of the car?

A. Yes, sir.

Q. He has to hold the handle down?

A. Well, if he don't, the catcher goes right back against the side of the car.

Q. Is the mail arm itself weighted?

A. Yes, sir; the weight of these rods at the bottom, and there is a casing at the handle; all that weight is hanging below the rod that goes through the brackets, and that weight is on—that is what swings it back to the body of the car.

Q. Now, what you call the vestibule door, where you start up the steps, there is an iron what might be called a grab iron, up and down?

A. Yes, sir.

Q. That extends out from the side of the coach?

A. One on each side of the doorway.

[fol. 252] Q. And is that true on Pullman cars and coaches both?

A. Yes, sir.

Q. That is there for a passenger or anyone to get hold of starting up the steps?

A. Yes, sir; that is right.

Q. How far does that stick out from the side of the train, do you know?

A. Three inches.

Q. And is that the normal standard?

A. Yes, sir.

Q. That is true with passenger equipment, is it?

A. Yes, sir; it is a government requirement that we must have a two and a half inch clearance on the inside of the handles.

Q. And is that the farthest protrusion out from the side of a railway passenger train, that is, in a normal train?

A. Yes, sir.

Q. What about the mail arm itself as hanging down by the side of the mail car when it is not extended out, does that protrude out as far as the hand rail of the coaches?

A. It rests against the hand rail. You see, if this was the hand rail, and this arm rests against that all of the time.

Q. Is there a hand rail on the mail car door?

A. Yes, sir; on each side.

Q. And which extends out farther, the hand rail or the mail catcher itself?

A. The mail catcher stands out five-eighths of an inch, which is the clearance of the iron itself.

Q. So the mail—

A. (Interrupting) It is resting against the grab iron and it extends out five-eighths, of an inch farther.

Q. Now, this bracket you have described which holds the mail arm, how high is that above the rails in standard equipment—is there a standard fixture for that?

A. Yes, sir.

Q. What is that standard?

A. From the top of the tie it is eight foot one and a half inches, from the top of the tie to the center part of the bracket.

Q. That holds the mail arm?

A. Yes, sir.

[fol. 253] Q. And so when the mail arm is extended out horizontal to the ground, like it would be in catching a mail pouch, the mail arm itself would be a little over eight feet above the top of the ties?

A. Yes, sir; of the ground itself, the ground is level with the ties as a rule.

Q. So it would be a little over eight feet above the top of the ground if it is extended straight out?

A. Yes, sir.

By Mr. Skinker: That is all.

Cross-examination.

By Mr. Gentry:

Q. Mr. Drashman, Mr. Edwards asked you a while ago if that dump or dirt or whatever it was that was north of the track, was next to that switch that we have been talking about. You did not mean to say that it came right up against the switch, did you?

A. No, sir.

Q. How far back was the bottom of the dump from the switch?

A. Well, Mr. Young and I stepped it off that night, and if I remember right it was about fifteen feet away from the switch.

Q. And the dump itself, you say you thought was about how high—eighteen or twenty inches, did you say?

A. About that; yes, sir.

Q. Now, as to whatever statements were made down there, when you and Mr. Young were down there, and at any time while you were down there near the switch, you do not know who made them, do you?

A. No, sir; I do not.

Q. And you don't know whether the person—

By Mr. Edwards (interrupting): Who are you referring to—when he was down at the switch where Haney's body was?

By Mr. Gentry: At the time he says he went down there, when he learned Haney had been hurt, he says he went down there only once.

By Mr. Edwards: And that is the switch that Haney threw there?

[fol. 254] By Mr. Gentry: Yes, sir; that is the switch I am talking about. (To Witness) You understood that was the switch I was talking about, didn't you?

A. Yes, sir.

Q. All right now. Whatever statements were made to you by people who came up into that crowd, were made by someone, but you don't know who it was?

A. That is right.

Q. And you don't know whether the person or persons that made such statement or statements were present when the accident happened or not, do you?

A. No, sir; I do not.

Q. And you don't know whether they claimed to have been present, do you?

A. No, sir.

Q. And you do not know how soon they got there after the accident was over, do you?

A. No, sir.

Q. Now, where were you when you got your first information about Mr. Haney being hurt?

A. Well, I was around the station. I was around the station master's gate. I thought I was around the gate, and then Mr. Young came through, and he says, "Let's go out on Broadway. I understand Haney got hurt."

Q. That was the first information you had?

A. Yes, sir.

Q. How did you get down there?

A. We walked down there.

Q. How far is that?

A. About a half a mile from the station gates.

Q. About half a mile?

A. Yes, sir.

Q. And you and he walked down there to that point?

A. Yes, sir.

By Mr. Gentry: That is all.

By Mr. Skinner: Now, Your Honor, in view of the testimony, I want once more to renew the motion that the testimony as to the hearsay, what he heard somebody say, be stricken out. It is too far removed from the accident, and not by anyone who saw it or purported to see it.

[fol. 255] By Mr. Gentry: I make the same objection, the same motion on behalf of my client.

By the Court: Motion denied, both motions.

To which ruling of the Court the Defendants, and each of them, by Counsel, then and there duly excepted at the time and still continue to except.

Redirect examination.

By Mr. Edwards:

Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?

A. I suppose it was a switchman, I don't know who it was.

Q. I asked you if that switchman was a Frisco switchman, and you said no, he was an I. C. switchman?

A. Probably I did, but there was no Frisco switchman around there at that time.

Q. What made you say that the man who made that statement was a railroad switchman?

A. Because there was a gang of switchmen around him when I got there.

Q. Did the man have a lantern—did he indicate he was a switchman?

A. They all had lanterns. I had my flashlight.

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that?

A. Yes, sir.

Q. That is true, isn't it?

A. I think so, no one else was around there but I. C. men at the time.

Q. But Mr. Gentry just asked you, you don't know the man's name, but you knew he was an I. C. switchman.

A. I know he was a switchman, yes, sir.

Q. A railroad switchman?

A. Yes, sir.

Q. There in the yards?

A. Yes, sir.

[fol. 256] Q. And it was made there at the switch?

A. I didn't say "at the switch." I said in that location.

Q. Well, there was several people there when that statement was made to you?

A. Yes, sir.

Q. And that was the one time you went down there?

A. Yes, sir.

Q. Now, this mail hook, or what do you call it—the pouch hook?

A. Mail pouch hook.

Q. When that hook is set out like this (indicating), from the side of the train, it extends out about three feet, doesn't it—you say now it extends out about twenty-six inches?

A. Do you mean when it is raised up?

Q. This brace Mr. Skinker just asked you about, you say that extends out about twenty-six inches?

A. No, sir; I said when you raise the hook preparatory to catching a pouch.

Q. That is what I mean.

— But they don't have to do it around there.

Q. But if that mail pouch hook was extending out that way, it would be extending out about twenty-six inches from the side of the train, as you now say?

A. If it was raised up, but they would have to open the door to do that, you see.

Q. Now, when the trains back in, did you ever see them back into the station on occasions like this—did you ever see the passenger trains backing in?

A. I have been watching them back in there off and on for forty years.

Q. Long trains like this, you have seen back in?

A. Yes, sir.

Q. Now, when those train are backing in, tell the Jury if those side doors on the express cars and mail cars are open or shut.

A. They are shut.

Q. Never saw one open?

A. I have seen them open after they backed into the depot.

Q. You never saw one open as they backed into the depot?

A. No, sir.

[fol. 257] Q. Never did in your whole forty years?

A. When a man is working in there he is supposed to keep those doors closed.

Q. Never saw one open in your whole forty years as it backed in, have you?

A. You mean, backed into the depot?

Q. Sure.

A. After they leave the main track and got on the line where I was, they opened them.

Q. I say, you never in your forty years saw one open as it backed in?

A. I refuse to answer that. I have already answered that.

Q. All right, if you refuse to answer.

Q. You are just trying to——

By Mr. Edwards: (Interrupting) All right, all right. Now, Mr. Drashman, could you have been mistaken about having been down at this Frisco switch where Haney was injured fifteen minutes, that you were down there three minutes and not down there fifteen minutes—but about three minutes, could you be mistaken on that?

A. Well, I was there longer than any three minutes.

Q. How is that?

A. I was there longer than any three minutes, because Mr. Young and I walked around the place there, and stepped off the distance from the switch to the spot. And I talked to some of their city detectives there for a while.

Q. And you claim when you were down there, that Haney's body was not there?

A. Yes, sir; I do claim that.

Q. Let me read from your deposition, page 192, do you remember these questions being asked you, and these being your answers in the deposition, speaking of what struck Haney: "Q. Could that have been with a round pipe? A. Well, it could have been, yes. Q. Did you see Haney's face? A. No. Q. Was he ever turned over so you could look at his face? A. Not while I was there. Q. How long did you remain there? A. Well, I imagine about three minutes. Q. [fol. 258] And then did you ever return to the place? A. Yes, after the body was moved." Do you recall testifying to what I have read, the answers to questions I have read here?

A. No, sir.

Q. Is what I have read to you true?

A. No.

Q. It is not true?

A. No.

By Mr. Edwards: I offer that in evidence.

By the Witness: As I told you, I never did see the body.

By Mr. Edwards: I offer that in evidence as part of the cross-examination. I offer, Your Honor please, in order that there be no mistake, what we have read. His deposition as on file in this Court, so that any parts of it may be used by anybody that wants to use it. There has been quite a bit of reading from this deposition in the pages given, and I offer the entire deposition in evidence, so that it will be available to anybody.

By Mr. Skinker: We have heretofore offered our objections to that, Your Honor. We renew them. There is no reason for that deposition to be introduced in evidence.

By Mr. Edwards: I understood there is no objection on your part.

By Mr. Gentry: Yes, I think I had better object to it, in view of what Mr. Skinker just said, because of the objectionable things we have pointed out heretofore, particularly.

By the Court: Very well, the same ruling, it may be admitted.

To which ruling of the Court, the Defendants, and each of them, by Counsel, then and there duly excepted at the time, and still continue to except.

Said deposition is as follows:

(Clerk will here insert deposition of witness John J. Drashman.)

Said deposition is hereinafter set out at pages 75-87.

[fol. 259] Cross-examination (Resumed).

By Mr. Gentry:

Q. Just one question. Mr. Drashman, you spoke of that switchman down there, that was talking down there at the scene of the accident, and you were asked if he was a Frisco switchman, and you said no. I believe you say you thought he was an Illinois Central switchman. Now, as a matter of fact, you did not make any investigation or any effort to find out whether that man was working for the Illinois

Central or for the Yazoo-Mississippi Valley Railroad, did you?

A. No, sir.

Q. And you do not know now what railroad company that man was working for, do you?

A. I do not, no, sir.

By Mr. Gentry: That is all.

Redirect examination.

By Mr. Edwards:

Q. You do know though from his appearance that he was a railroad switchman, don't you?

A. Yes, sir; that is right.

Q. You have had the experience of seeing railroad switchmen there in the yards for about forty years, haven't you?

A. That is right.

Q. And this man was dressed, and had all of the appearances of a railroad switchman, that made this statement to you here, wasn't he?

A. That is right.

Q. You saw blood there near the switch, the Frisco switch, where Haney was hurt, did you not?

A. No, sir.

Q. Don't you remember so testifying that you saw blood there?

A. I saw the blood on the mound, not near the switch.

Q. How near the switch?

A. Oh, about fifteen feet.

Q. Don't you remember testifying this blood, that you saw this blood within about six feet of the tracks?

A. No, sir; I do not.

Q. I will ask you, on page 193, if you do not recall testifying to that in your deposition, starting at the bottom [fol. 260] of page 192: "Q. Oh, after they moved the body. Did you see any blood around there where—close there? A. Yes, there was a spot of blood about six inches across. Q. About what? A. About six inches across." Do you remember testifying to that?

A. No, sir; I do not; I didn't measure it.

Q. Is that true?

A. That is your statement, I don't know anything about it.

Q. I mean, did you testify to what I have read?

A. I did not.

Q. And it is not true?

A. No, sir;

Q. The next question: "Q. And about how far was that blood from the Frisco tracks? A. Well, I didn't measure it, but I should judge about six feet, something like that.

Q. About six feet, something like that? A. Yes." Do you remember so testifying?

A. Yes, sir.

Q. That is true, isn't it?

A. That is, yes, sir.

Q. Well, why did you just get through saying that you did not say that?

A. That is not the question you asked me, but that is a different question, a different answer altogether.

Q. All right, (Reading) "Q. And that, you mean six feet north of the north track of the Frisco tracks? A. I mean south of that track there where the Frisco backs in on." Did you testify to that?

A. No, sir; that is the north side, that is what I told you.

Q. Then you testified it was both south and north, didn't you?

A. No, sir.

Q. Well, what do you say now, did you see blood there?

A. I did.

Q. All right, did you see blood there north or south of the Frisco track?

A. North of the Frisco track.

Q. Well, a minute ago, you say you saw blood on the mound.

A. That is right, that mound is north of the Frisco track. [fol. 261] Q. There is no mound south of the Frisco track, is there?

A. No, sir.

Q. Then, if you saw a mound it was north of the Frisco tracks, wasn't it?

A. That is right.

Q. Then, did you testify as I read to you, that you saw this blood south of the tracks, too?

A. No, sir.

Q. Well, in order to get it clear, I will read that again, that last one: "Q. And that, you mean six feet north of the north track, of the Frisco tracks? A. I mean south of that track there where the Frisco backs in on." Do you remember testifying to that?

A. You have the wrong wording, if I testified to you that way. I told you that the blood was north of the Frisco tracks and south of the wye where they back into the depot.

Q. Well, did you testify to what I just read?

A. No, sir.

Q. Now the next question: "Q. The Frisco track there runs generally east and west, at the switch, I mean? A. Yes." You testified to that, didn't you?

A. Yes, sir.

Q. "Q. Now, which way from this switch did you notice this blood, east or west of this switch? A. It was south, south of the rail, I don't know how close to the switch." Did you so testify?

A. No.

Q. "Q. South of the rail? You mean north of the rail? A. I mean south, going south, on the south side of the railroad track, backing to the station—the track runs east and west. Q. That is right. A. This is on the south side of the track." Do you remember so testifying?

A. I do not.

Q. Is that true, what I have read to you, is that true?

A. What?

Q. What I have just read.

A. (No Response.)

Q. Well, further: "Q. That you saw blood? A. Yes, sir. Q. How close was that blood to his body? A. That was after his body was removed." Did you so testify?

A. Yes.

[fol. 262] Q. Is that true?

A. That is true, I saw it after the body was removed.

Q. Did you see it south of the Frisco tracks, did you see blood south of the Frisco tracks?

A. I just got through telling you a while ago where it was.

Q. Just answer the question, did you see it south of the Frisco tracks?

A. No.

Q. Then what I have read about it being south of the tracks, is not true, is it?

A. No.

Q. You say you only went there once?

A. Yes, sir.

Q. You did not go twice?

A. No, sir.

Q. Now, on page 194, do you recall about that: "Q. When did you return there after the body was removed? The next day? A. No, the same night. Q. That night. Did anybody return with you? A. Yes. Q. Who was that? A. Mr. Young and I were down there together. Q. Mr. who? A. Young. Q. Did Mr. Young go there with you the first time? A. Yes, sir." Do you remember so testifying?

A. No, sir; I told you we went down there together one time, that is all.

Q. And the next question: "Q. And also the second time? A. Yes." Did you so testify?

A. I did not.

Q. Is that true?

A. No.

By Mr. Edwards: All right, I think that is all.

By Mr. Skinker: That is all.

(Witness excused.)

Deposition of John Joseph Drashman given in this case on May 1, 1941, before Lee Winchester, a notary public at Memphis, Tennessee, is in words and figures as follows, to wit:

[fol. 263] JOHN JOSEPH DRASHMAN, of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says on the part of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

Q. Give us your name in full?

A. John Joseph Drashman.

Q. What is your business?

A. Frisco Railroad.

Q. Where do you live, Mr. Drashman?

A. 540 East Trigg Avenue, Memphis, Tennessee.

Q. And you are employed by the Frisco Railroad?

A. Yes, sir.

Q. What do you do for them?

A. Coach foreman.

Q. Coach foreman?

A. Yes, sir; foreman of passenger equipment.

Q. And what are your duties as such foreman?

A. Supervise cleaning and repairs of all passenger equipment.

Q. And you occupied that position in December, 1939?

A. Yes, sir.

Q. Did you know Lyman Haney?

A. I believe I did.

Q. You were not well acquainted with him, I suppose?

A. No.

Q. Did you know where he worked as a switch tender?

A. Yes, sir.

[Page 189]

Q. Were you in the vicinity of where he was injured on December 21, 1939?

A. I went down there right after I heard that there was an accident there.

Q. And where were you when you heard there was an accident?

A. Up around the Stationmaster's office.

Q. What did you find when you got down there and where did you go?

A. Well, I went down to the switch tender's shanty there.

[fol. 264] Q. You went to Haney's switch tender's shanty?

A. Yes.

Q. And did you go to a switch near by, where his body was?

A. Well, I don't think his body was by any switch, it was between the switch stand and—

Q. Well, did you see Haney's body down there?

A. Yes.

Q. And how far was it from the Frisco switch, from the main line?

A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks?

A. I did not measure that.

Q. What would be your best judgment?

A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to?

A. Well, I think the whole body.

[Page 190]

Q. The whole body. And which way was Haney's head pointing when you first saw it?

A. I believe it was west.

Q. Pointed west. And was he lying on his back or on his face or side or how?

A. On his face, if I remember right.

Q. Lying on his face?

A. Yes.

Q. With his back up?

A. Yes.

Q. And you think his head was faced west?

A. Yes.

Q. Are you sure about that?

A. No, I am not sure. I think it was.

Q. Well, I just want to know if you are reasonably sure.

A. No, I am not sure, because I didn't pay that much attention to it.

Q. He might have faced east then?

A. Yes, could have been.

Q. I see. Who was there when you arrived where you found Mr. Haney, as you say?

A. Well, Mr. Young and I went down together, our superintendent of terminals.

[fol. 265] Q. And who was there when you arrived there?

A. Well, I don't know; there were several parties there, and I think this I. C. switch engine foreman, Brusco, he was there, and I think there were several of the City plain clothes men were there.

[Page 191]

Q. These men were there when you got there that you are speaking of?

A. Yes.

Q. You think there were several men there?

A. Yes.

Q. Did you notice anything about Haney's head or body that indicated he had been injured?

A. Well, I saw what looked to me like a hole knocked in the back of his head, like someone had struck him with a blunt instrument of some kind.

Q. What kind of a wound was that on the back of Haney's head?

A. Well, it looked like a caved-in place, it wasn't exactly a cut place, it looked like someone had hit him with a club or something.

Q. Could that have been made with a round pipe?

A. Well, it could have been, yes.

Q. Did you see Haney's face?

A. No.

Q. Was he ever turned over so you could look at his face?

A. Not while I was there.

Q. How long did you remain there?

A. Well, I imagine about three minutes.

Q. And then did you ever return to the place?

A. Yes, after the body was moved.

Q. Oh, after they moved the body. Did you see any blood around there where—close there?

A. Yes, there was a spot of blood about six inches across.

[Page 192]

Q. About what?

A. About six inches across.

Q. And about how far was that blood from the Frisco [fol. 266] tracks?

A. Well, I didn't measure it, but I should judge about six feet, something like that.

Q. About six feet something like that?

A. Yes.

Q. And that, you mean six feet north of the north track, of the Frisco tracks?

A. I mean south of that track there where the Frisco backs in on.

Q. The Frisco track there runs generally east and west at the switch, I mean?

A. Yes.

Q. Now, which way from this switch did you notice this blood, east or west of the switch?

A. It was south, south of the rail, I don't know how close to the switch.

Q. South of the rail? You mean north of the rail?

A. I mean south, going south, on the south side of the railroad track, backing to the station—the track runs east and west.

Q. That is right.

A. This is on the south side of the track.

Q. That you saw blood?

A. Yes, sir.

Q. How close was that blood to his body?

A. That was after his body was removed.

Q. How is that?

A. That was after his body was removed that I saw the

[Page 193]

blood.

Q. Did you see any blood there while the body was there?

A. No.

Q. You didn't?

A. No, not except on his head there.

Q. When did you return there after the body was removed? The next day?

A. No, the same night.

Q. That night. Did anybody return with you?

A. Yes.

Q. Who was that?

A. Mr. Young and I were down there together.

Q. Mr. who?

A. Young.

Q. Did Mr. Young go there with you the first time?

A. Yes, sir.

Q. And also the second time?

A. Yes.

Q. Was anybody else there with you the second time?

[fol. 267] A. There were three of those, I think plain clothes men, City detectives.

Q. Do you know who they were?

A. No, I don't know who they were.

Q. Did you measure this distance from where the blood was?

A. No.

Q. Is there a mound north of the Frisco tracks there at the switch?

A. Well, there may be what you call a mound; there is a pile of dirt piled up there.

Q. And where is this pile of dirt with reference to the

[Page 194]

switch, which way from it?

A. I don't know.

Q. Is it north or south?

A. I don't know, I don't know just where that switch is, I didn't pay any attention to it.

Q. Do you know how high that mound of dirt is?

A. Well, I imagine about two feet above the rail.

Q. About two feet above the rail. And about how long does that extend along there?

A. Oh, several feet.

Q. Does it extend east and west of the switch?

A. Both east and west of the tracks, yes.

Q. What do you have to do with the Frisco equipment?

A. I supervise repairs and cleaning of it.

Q. Do you supervise repairs of trains such as this Frisco Train No. 106?

A. Yes.

Q. Did you examine Train No. 106 after Haney was found?

A. Yes, sir.

Q. Where did you examine it?

A. In the station after it was backed in under the shed.

Q. In the station?

A. Yes, sir.

Q. Was that after you heard Haney was killed or hurt?

A. After I was down to the scene of the accident I went back.

Q. You mean after you had gone down and seen Haney?

A. Yes, sir.

Q. And you came back?

A. Yes.

[Page 195]

[fol. 268] Q. Then you examined the Frisco train?

A. Yes.

Q. Did you do that personally or have some assistance?

A. I did that personally.

Q. What examination did you make?

A. To see if there was anything protruding on the side of the train, any grabholds, any handles or anything outside of the cars.

Q. How long was that train, that Frisco train, how long was it?

A. I believe it was nine cars.

Q. Do you know what those cars consisted of, what kinds?

A. Yes.

Q. What kind were they?

A. They had a combination mail and baggage, two baggage cars, two coaches, diner and two sleepers, Pullman cars they call them—

Q. How many mail cars?

A. One mail car, combination mail and baggage.

Q. Did you look all along that train?

A. Yes, sir.

Q. What did you find?

A. Nothing.

Q. Why did you look along that train?

A. That is customary if we have a report of any kind of an accident, whether we are involved or not, to make an inspection.

Q. You made an inspection, I believe, you just told me, after you had seen Haney's body where he was injured up there?

A. Yes.

[Page 196]

Q. Now, had you a custom of examining this train otherwise whether you had any report of any accident?

A. No—we have an inspector that does that kind of work.

Q. But you made a special examination on this occasion?

A. Yes, sir.

Q. And you found nothing wrong?

A. That is right.

Q. Did you find this mail coach, on this mail coach, did it have any mail hook on it?

A. Yes, one on each side of the car.

Q. One on each side. What kind of a hook is that, can you describe that?

A. Yes, it is iron, V-shaped.

[fol. 269] Q. And how does that work?

A. One side of it is fastened through brackets on each side of the door posts, and the other hangs down against the side of the car, with a handle on top.

Q. Can that be extended out to the side of the train?

A. Yes.

Q. How far out to the side of the train can that mail hook be extended?

A. You can swing it out three feet.

Q. Swing out three feet?

A. To the tip end of the hook.

Q. I believe these trains have a hang-over of about two feet and a half, I believe it was stated here—did you say

[Page 197]

two feet and a half, Mr. Skinker?

Mr. Skinker: He would know about that.

Mr. Edwards: Well, you said two feet and a half.

A. Hang-over how?

By Mr. Edwards:

Q. From the side of the rail, these passenger trains, such as this No. 106, extend out about two and a half feet from the side of the rail, is that right?

A. No.

Q. How is that?

A. No.

Q. Well, how far do they extend outside of the rail?

A. What do you mean, the body or journal box or what?

Q. The body of the train, the coaches?

A. The body of the train, not over fourteen inches.

Q. Fourteen inches?

A. Yes.

Q. Does any other part of the train extend out any farther to the side?

A. No.

Q. How is that?

A. No, sir.

Q. It don't?

A. No, sir.

Q. Well, you spoke of examining this train, did you examine the right side, the engineer's side?

A. Yes, I went around both sides, but particularly on the engineer's—on the—it was on the fireman's side.

[fol. 270] Q. Oh, you particularly examined the fireman's side?

A. Yes.

Q. Now, what do you mean particularly examined the fireman's side—did you examine that better than you did

[Page 198]

the engineer's side?

A. I looked at that very close.

Q. You examined the fireman's side very close?

A. Yes.

Q. And you didn't examine the engineer's side quite so close?

A. Not so close, no.

Q. Why was that difference?

A. Well, because someone said that they thought that train No. 106 backing into Grand Central Station is what struck this man.

Q. You mean Haney?

A. Yes.

Q. That is, someone told you that at the scene of the accident?

A. No, he didn't see the accident, I heard someone say that is what happened.

Mr. Skinker: Just a moment. We object to that and ask it be stricken out as purely hearsay.

A. That is all—I didn't get who it was.

By Mr. Edwards:

Q. All right, who told you that, and when?

A. I don't know who it was, I just heard them talking around there.

Q. Who did you hear talk and where?

A. I don't know who it was, down where Haney's body was laying on the ground.

Q. Where Haney's body was laying on the ground?

A. Yes.

Q. That is where you heard this statement made?

[Page 199]

A. Yes, sir.

Q. Somebody said they thought something sticking out on the train hit him, is that right?

A. That is what I heard there.

Q. That is what you heard there?

[fol. 271] Mr. Skinker: Just a moment; I want to object to that as hearsay and improper and may it go to all similar questions?

Mr. Edwards: Yes.

By Mr. Edwards:

Q. That was down there when you first went down and saw Haney's body?

A. Yes.

Q. You heard someone there, where the body was, saying that they thought something sticking out on the train hit him, is that right?

A. That is right.

Q. When you heard that you went back and examined the train?

A. That is right.

Q. Now, is it possible this mail hook could have hit him?

A. No.

Q. Why not?

A. Because the body was too far from the rail.

Q. You mean too far out, north of the rail?

A. Yes; and it is above the average height of a man's head.

Q. Well, this place where the train backed in, the north side of the rail would be lower than the south, wouldn't it?

[Page 200]

A. Well, I don't know that it would.

Q. Wouldn't that train backing in like that lean a little to the north?

A. Well, no, I don't think that there is that much elevation there to cause the equipment to lean.

Q. Would you say the train wouldn't lean any to the north?

A. No.

Q. I say you say it wouldn't?

A. I say it would not.

Q. Are these mail hooks, you talked about here, all the same height?

A. They are all standard.

Q. Don't they ever get bent?

A. Very seldom.

Q. They do sometimes, don't they?

A. Oh, yes.

Q. Sometimes they swing out from the side of the train, don't they?

A. No, the weight holds them against the side of the car.

[fol. 272] Q. Sometimes they tie them to the side of the train, don't they?

A. Tie them?

Q. Tie them to the side of the train?

A. No, you can't tie them, the mail clerk has got to use them.

Q. When were you in the Frisco yards last?

A. About 12:15 today.

Q. Were you down there last night?

A. I was down at Grand Central Station last night.

Q. Haven't you got one tied down there right now?

[Page 201]

A. Not that I know of.

Q. Tied to the side of the car with a string, a heavy string?

A. No, not on the Frisco—if there is I haven't seen it.

Q. You have seen them that way, haven't you?

A. No.

Q. Do the switch tenders, such as Haney, have any duties to perform under your supervision?

A. No, sir.

Q. You have nothing to do with switch tenders?

A. No, sir.

Q. Do you know how the switch tenders work?

A. No.

Q. Do you know anything about their duties?

A. Not a thing.

Q. Did you ever see Haney after that first time that you told us about going there to this Frisco track?

A. No.

Q. How is that?

A. No, sir.

Q. Do you know how soon they removed Haney's body after you and Mr. Young first went to the scene where he was found?

A. No, I do not.

Q. Did this Frisco train that you have described, No. 106, have any baggage coaches on it?

A. Yes.

Q. How many, did it have?

A. Two.

Q. Do you know what they were carrying at that time?

[Page 202]

[fol. 273] A. Various commodities shipped by express companies.

Q. They were pretty heavily loaded, weren't they?

A. I imagine they were, I don't know.

Q. Just before Christmas—did you say you imagine they were?

A. I imagine they were, yes.

Q. That train was longer than usual, wasn't it, that Frisco train?

A. Well, I don't think so.

Q. You don't think so?

A. No.

Q. I mean on account of it being just before Christmas, do you think that caused them to haul more and have more coaches on that train?

A. No.

Q. You don't think it did?

A. No.

Q. You think the number of coaches was about what they usually have?

A. As a rule they do, yes.

Mr. Edwards: You can take the witness.

Cross-examination.

By Mr. Skinker:

Q. What did you call that lever in the mail car that you have been talking about, what is the name of it?

A. Mail pouch catcher.

Q. Mail pouch catcher?

A. Yes.

Q. That is the metal rod that is V-shaped?

A. Yes.

Q. And used to pick up packages, usually of mail, while the train is in motion, isn't it?

A. Yes, while the train is in motion; the agent hangs

[Page 203]

the mail on a hook and while the train is in motion the mail clerk swings that handle out that way and that catches the sack in the V-shape there.

Q. Now, is there any way to move that pouch handle, I believe you call it, is there any way to move that pouch handle except as the U. S. mailman in the car moves it?

A. No.

[fol. 274] Q. He moves it from inside the car?

A. From in the doorway.

Q. In other words, he presses down on the handle on the inside of the car?

A. Yes.

Q. And that brings the pouch catcher up on the outside?

A. That is right.

Q. How high is that pouch catcher above the rail?

A. About eight feet.

Q. About eight feet?

A. Yes, sir.

Q. That is above the head of a man, of course?

A. Oh, yes.

Q. Did you know Mr. Haney in his lifetime?

Mr. Edwards: He said he didn't.

A. I believe I did, I think he was a man just about my height.

By Mr. Skinker:

Q. And how tall are you?

A. Five feet six.

Q. Now, as I understand you, Mr. Drashman, as I understand you, you examined this entire train from the front

[Page 204]

to the back?

A. Yes, sir.

Q. And on both sides

A. Yes, sir.

Q. And you found nothing out of kilter or nothing irregular?

A. No.

Q. On any part of the train?

A. No.

Q. Is there any kind of rod or pipe or mail pouch catcher or anything of that kind extending out from the side of the train on either side?

A. No. The handholds, they extend out—

Q. (Interrupting) I mean on this occasion, extending out beyond their normal fixed place?

A. Oh, no, nothing, not a thing, there was nothing out of line whatever.

Q. Everything was in its regular normal place?

A. Yes, sir, everything.

Mr. Skinker: I believe that is all.

[fol. 275] Further direct examination.

By Mr. Edwards:

Q. Isn't it a fact, Mr. Drashman, you can go along and raise these mail hooks up on the side of the train?

A. No, you can't raise them.

Q. You can't?

A. No.

Q. I raised about six of them up last night.

A. Probably you can, you are a little taller than the average man—but how high could you raise them?

[Page 205]

Q. Oh, raise them up, taking them all, they are not fastened, they are not fastened down, are they?

A. No.

Q. These mail hooks are not fastened down, are they?

A. No, sir.

Q. To the side of the train, are they?

A. No, sir, not on the bottom.

Q. Last night I didn't find any—you can just take and raise them up.

A. Where were you?

Q. Over in the Grand Central?

A. Over in the Grand Central Station?

Q. That is right.

A. The platform is about six inches above the rail.

Q. There was about six or seven cars in there and there wasn't any you couldn't raise up, because I did that last night.

A. You can raise them up, but they will not swing out with the motion of the car.

Q. What is that?

A. They will not swing out with the motion of the car.

Q. They will not swing out with the motion of the car—but I say, they are not fastened down?

A. They are not, no.

Q. That is what I want to get at, these mail hooks are not fastened down.

A. No.

[Page 206]

[fol. 276] Appellants have reduced the testimony of Dr. W. E. Turner, Jr., in their joint abstract of the record so much so that it does not express and convey its full meaning and effect and respondent therefore believes that in order to fairly and fully present the testimony of Dr. W. E. Turner that it will be necessary to print the same in full taken from the Bill of Exceptions, pages 205 to 225, inclusive.

The deposition of Dr. W. E. Turner, Jr., taken by the respondent on December 16, 1941, at the Army Dispensary 1, Engineer Replacement Training Camp, Group 6, Fort Leonard Wood, in Pulaski County, State of Missouri, before Notary Public Rufus L. Robertson, is as follows, to-wit:

Appearances:

N. Murry Edwards, Esq., for the plaintiff.

C. H. Skinker, Jr., Esq., by Walter Studt, Esq., for the defendants.

It was stipulated and agreed by and between counsel for plaintiff and counsel for defendants, that this deposition may be taken in shorthand by Joseph Feldman, a

shorthand reporter of the City of St. Louis, and afterwards transcribed into typewriting and the signature of the witness waived.

W. E. TURNER, JR., of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, deposes and says in behalf of the plaintiff as follows:

Direct examination.

By Mr. Edwards:

Q. Will you give us your name in full?

A. Wiley E. Turner, Jr.

[fol. 277] Q. Where do you live, Doctor?

A. My office, is that what you mean?

Q. Yes.

A. Piggott, Arkansas.

Q. And you are now stationed in the United States Army?

A. Yes, sir.

Q. A lieutenant in the medical corps here at Camp Fort Leonard Wood?

A. Yes, sir.

Q. Will you tell us from what medical school you are a graduate?

A. University of Tennessee.

Q. And when did you graduate from the University of Tennessee Medical School?

A. That was in March, 1939.

Q. You got your M. D. in March, 1939?

A. Yes.

Q. And what did you do in the line of practicing your profession as a doctor after you finished medical school?

A. I went into general practice in surgery—a general practitioner, you better put it.

[Page 2]

Q. Your father, I believe, is a doctor?

A. Yes.

Q. And were you connected, after your graduation from medical school, with some hospital at Memphis, Tennessee?

A. Yes, sir, the St. Joseph's.

Q. The St. Joseph's Hospital in Memphis, Tennessee?

A. Yes, sir.

Q. And where is that hospital located?

A. It is—what is the date of this thing—I am thinking of whether or not I was a junior interne or a senior interne—

Q. This date is December 21, 1939?

A. It is on Jackson—the number of that on Jackson—

Q. St. Joseph's Hospital is on Jackson street, in Memphis, Tennessee?

A. Yes, either 186 or 286, I believe.

Q. What were your duties down at the St. Joseph's Hospital at Memphis, Tennessee?

A. I was an interne.

Q. And you were an interne there in December, 1939?

A. Yes, sir.

[fol. 278] Q. What were your duties there—what did you do and what did you have to take care of?

A. It was a rotating internship.

Q. Were you on a receiving ward or department of that hospital for awhile?

A. Yes, sir.

Q. And you were on the receiving ward, were you, in December, 1939?

A. Yes, sir.

[Page 3]

Q. Now, that hospital, St. Joseph's Hospital is a regular hospital conducted as other hospitals, I believe, isn't it?

A. Yes.

Q. Quite a large hospital, is it, Doctor?

A. Yes, sir; it is, I would say the average size for a city.

Q. And that hospital keeps records like other hospitals?

A. Yes, sir.

Q. You are familiar with hospitals, I suppose, in other states besides Tennessee—Missouri and other states—Missouri and Arkansas?

A. Yes, sir.

Q. And was the hospital, the St. Joseph's Hospital at Memphis, Tennessee, conducted in the same manner in which hospitals in Arkansas and Missouri were conducted?

A. Yes.

Q. And did they keep records in the same manner in which they do in Arkansas and Missouri?

A. Yes, sir.

Q. And Tennessee?

A. Yes, sir, as far as I know, they do, yes.

Q. Now, just how long were you at St. Joseph's Hospital, Doctor, do you recall?

A. Let's see, the exact dates, let me see—I was there about fourteen months, I think, as a senior interne, I was there eighteen months as a junior before I started the senior internship.

[Page 4]

[fol. 279] Q. And after leaving St. Joseph's Hospital at Memphis, you went to Piggott, Arkansas, with your father, I believe?

A. Yes.

Q. You and your father opened some kind of a small clinic or hospital, did you not?

A. Yes.

Q. And how long did you serve there with your father at Piggott, Arkansas?

A. I was there from April until, let's see, April, 1940, until June 10, 1941.

Q. April, 1940, until June 10, 1941, this year?

A. Yes, sir.

Q. And you and your father conducted this hospital—what did you call that hospital there?

A. The Turner Clinic.

Q. Turner Clinic?

A. Yes, sir.

Q. And you had a great number of patients?

A. Yes.

Q. I believe I visited you there last spring?

A. We had plenty of work—yes, sir.

Q. And you had an average of about how many patients a day at that clinic at Piggott, Arkansas?

A. We run around, I guess around an average of forty patients.

Q. Forty patients a day at the clinic at Piggott, Arkansas?

A. Yes, sir.

Q. This clinic at Piggott, Arkansas, your father still conducts that?

A. Yes, sir.

[Page 5]

Q. Going back to your services at this St. Joseph's Hospital at Memphis, Tennessee, I will show you a paper which is a photostat copy of the record of Lyman T. Haney, taken to the St. Joseph's Hospital at Memphis, Tennessee, December 21, 1939, and ask you if you identify that as being a regular record of the St. Joseph's Hospital kept in the regular operation of their business?

A. (After examining) Yes, sir.

Q. It is?

A. It is; yes, sir.

[fol. 280] Mr. Edwards: I will let this record be marked Plaintiff's Exhibit 1 to this deposition. Let the reporter mark it.

(The reporter marked said photostat copy of hospital records as Plaintiff's Exhibit 1, J. F. 12/16/41.)

Q. Now, Plaintiff's Exhibit 1 consists of six photostat copies of six pages of the hospital records dated December 21, 1939, of Lyman Haney. Now, Doctor, will you take Plaintiff's Exhibit 1, being the hospital record I have described, of Lyman Haney, dated December 21, 1939, and tell us what you had to do with Lyman Haney and what examination you made and what you found?

A. Well, the main thing that I had to do was to decide that he was dead, because he was dead, and I just pronounced him dead. Of course, I went over his body externally, and then we carried him on to the morgue and I assisted in the autopsy.

[Page 6]

Q. Assisted in the autopsy?

A. Yes.

Q. Then you made up this record here, Plaintiff's Exhibit 1 that you are looking at, the hospital record of St. Joseph's Hospital?

A. Yes, I made this out (indicating).

Q. Now, the first page of the hospital record of the St. Joseph's Hospital of Lyman Haney, is made out in your handwriting in longhand, is it, Doctor?

A. Yes, sir.

Q. Will you read into the record what you found Lyman Haney died of, and why you found it?

A. He died of a fractured skull and he had a subdural hemorrhage—do you want me to read all of this?

Q. Go ahead, read what you found. You can refresh your memory, Doctor, by looking at that record, and read what you found?

A. Well, don't write all this down—this is what we found, the whole thing right here.

(Then followed a short discussion off the record.)

[fol. 281] Mr. Edwards: Go ahead and just tell, from an examination of Lyman Haney, what you found?

A. Well, we found the deceased was a white male, it was the body of a well developed, under average size male, of about fifty years. He had an abrasion of the right posterior part of his head—

Q. That is the back of his head you mean?

A. Yes.

[Page 7]

Q. Go ahead.

A. Approximately five centimeters long and one centimeter wide with a depression of the skull under the abrasion involving occipital and parietal regions.

The right side of the face was covered with wet, dirty cinders ground into the face, and the lips were bruised and cinders and blood were on his lips. He had artificial teeth. And the rest of his body was free of abrasions, lacerations, or bruises.

The extremities were freely movable—mobile. Rigor mortis had not set in—it was absent. I can't remember all that but as I read it I know that is the way it was, and I know this is an exact record and I can tell. This other is given in the autopsy here—just a minute—and I don't know that there would be any use in saying this or that—
 } we found this at the autopsy, not in the examination—I can give all of that, all right, if you want me to.

Q. No, just give the skull part.

Mr. Studt: Wasn't the whole part of that, part of your autopsy, all your findings, too?

Mr. Edwards: Here is what it is—this is probably repetition of what he has already given.

A. Here, this, as to his lungs, you see, we start at the head and you might say go over everything; it was a com-

plete autopsy, the lungs, heart, liver, spleen, intestines, urinary bladder, skull, and all that.

[Page 8]

[fol. 282] Q. You assisted in the autopsy, and all those findings in the hospital record are what you found?

A. Yes.

Q. And of the skull, principally, we are interested in—I understand he died of a—

A. This is the cause of his death (indicating).

Q. The skull injury killed him?

A. Yes, and the hemorrhage from the skull injury.

Q. And the hemorrhage from the skull injury?

A. Yes, sir.

Q. At the bottom of the report, Doctor, as to the skull, what did you find about the injury to the skull?

A. There was an extravasation of blood into the scalp, temporal and occipital muscles adjacent to the above described abrasion of the head. There was a fracture of the calvarium radiating downward from the abrasion to left and right involving right parietal occipital, right and left temporal and sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. The spinal fluid was clear.

Now, the diagnosis after our autopsy—

Q. Go ahead.

A. Was traumatic fracture of skull with associated meningeal hemorrhage.

Cause of death was due to the fracture of the skull following blow applied to the head posteriorly perhaps by a piece of iron pipe, a small fast moving object, round object, probably.

[Page 9]

Q. Now, will you go back, Doctor, to the first page of this exhibit, of the hospital record and tell us what the finding was there—that is your handwriting?

A. Yes, right here.

Q. Go ahead, tell us about that?

A. It says "Where and How accident occurred."

[fol. 283] Q. Yes.

A. Railroad yard, cause undetermined, fractured skull by fast moving small round object. That is, just as our

experience shows, we know that certain types of objects cause certain types of fractures.

Q. That was your conclusion that this injury to the back of the head was caused by a——

A. Small round fast moving object.

Q. Small round fast moving object?

A. Yes.

Q. Now, in your opinion could that small round fast moving object be a rod or something projecting out from a train that was going eight or ten miles an hour?

Mr. Studt: I object to that question on the ground a groundwork has not been laid, and what the doctor perhaps knows about the construction or equipment of a train is improper——

Mr. Edwards: I am just assuming that will be part of the evidence and the proof later. I am asking the doctor if what he found, by a small round fast moving object, if that would be an object or could it be an object on a train backing eight or ten miles an hour.

[Page 10]

A. I guess it would be possible, as far as I know about it, I don't know anything about it but I think it could be.

Q. And why do you find, Doctor—why did you find that this injury to the back of the deceased Haney's head was caused by a small round fast moving object? What indicated that to you?

A. Well, probably it was a little fresher in my memory then than it is now, but a large blunt object causes a certain type of fracture and a small short object, like a bullet, or something like that, fast moving, pointed object, causes another type of fracture, a penetrating type of fracture, and a round iron pipe or something like that would cause [fol. 284] another type of fracture. In other words, it looked like it was something that was spread out more, you know, on his skull.

Q. And you concluded, after examining Haney, and from the autopsy, that this injury to the back of his head was caused by a round fast moving object?

A. Yes, sir.

Q. Maybe an iron pipe?

A. Sure, yes, sir.

Q. And that of course was made up from your entire examination of Lyman Haney's body?

A. Yes, sir.

Q. And the autopsy?

A. Yes, sir, and it was the opinion of Dr. Kessler—

Mr. Studt: Well, I object to that.

A. And Dr. McIntosh.

[Page 11]

Mr. Studt: I object to that.

Mr. Edwards: I will ask you a question:

Q. Did you also consult with the other doctors assisting in the examination and autopsy of Lyman Haney's body, to come to these conclusions?

A. Yes, I did.

Q. (Continuing:) Written into these hospital records?

A. Yes, sir.

Mr. Studt: I object to that upon the theory it is probably more or less hearsay, anything from the associated doctors that conducted the autopsy with Dr. Turner.

A. That was our opinions; of course, I mentioned my own.

By Mr. Edwards:

Q. All you doctors were together there when you had gone over this case of Lyman Haney?

A. Yes, sir.

Q. And that was the conclusion you had reached and the other doctors had reached after you went over the body of Lyman Haney?

Mr. Studt: We object to that because it calls for a conclusion, the opinions of doctors not present here, and the best evidence would be those doctors themselves. I don't [fol. 285] think Dr. Turner is competent to testify what any other doctor found.

(The last question was read by the reporter.)

Q. That is true, isn't it, Doctor?

A. Yes, sir; that is it.

[Page 12]

Q. You, in your experience in medical school, as well as at the St. Joseph's Hospital, I suppose, had many cases of violent deaths, of bodies brought into the hospital to examine, did you not, Doctor?

A. Yes, sir; we had quite a few.

Q. And in those many cases you came to the conclusion or tried to come to the conclusion as to what caused the death of those various patients and people brought in there?

A. Yes, sir; yes, sir.

Q. I suppose you have had experience, too, you and your father, in the clinic at Piggott, Arkansas, with traumatic injuries and violent deaths there?

A. A few—we didn't have so many there.

Q. You didn't have as many as you had in Memphis?

A. No, sir.

Q. And you concluded, after the examination and autopsy of the body of Lyman Haney, deceased, that he was struck in the back of the head by a round fast moving object?

A. Yes, sir; that is it.

Q. And that round fast moving object could have been a rod or round moving object attached to a backing train going eight to ten miles an hour?

Mr. Studt: Well, I object to that on the theory Mr. Edwards is trying to just assume that it might have been something attached to the train, without any definite proof to that effect.

[Page 13]

[fol. 286] Mr. Edwards: Well, that will have to be proven later.

A. As far as I know, it could be. I couldn't say it was or anything about it.

By Mr. Edwards:

Q. I know you couldn't say it was, you didn't see it, Doctor, you are only testifying as a medical expert?

A. And we didn't have a lot to go by, except what we saw on the body.

Mr. Edwards: Read the question again.

The reporter read the previous question as follows:

"Q. And that round fast moving object could have been a rod or round moving object attached to a backing train going eight or ten miles an hour."

A. Yes, I reckon it could have been.

Mr. Edwards: That is all.

Cross-examination.

By Mr. Studt:

Q. Dr. Turner, this Plaintiff's Exhibit 1 here, that has been presented to you, is this a complete record of the case of this man Haney that you prepared yourself personally?

A. Yes, that on the front you mean.

Q. Just this here?

A. This is mine alone.

Q. Just the first sheet of this exhibit is yours?

A. Yes.

[Page 14]

Mr. Edwards: In his handwriting, as I understand, Mr. Studt.

Mr. Studt: Yes—is in your handwriting and prepared by you?

A. Yes.

Q. Now, this first sheet, the report by you, was made immediately upon the reception of Mr. Haney's body into the hospital, is that it?

A. Yes, sir.

Q. Now, with respect to this autopsy, did you make this autopsy report, too, yourself?

A. You mean did I write it there, or are those my words there?

[fol. 287] Q. Well, yes, did you have anything to do with making this autopsy report, preparing it?

A. I was at the autopsy and took part in the autopsy, but that was dictated to me, I believe, or to Dr. Kessler, by Dr. McIntosh; he was head pathologist on examination there.

Q. In other words, Dr. McIntosh, in effect, prepared and dictated these findings?

A. Yes.

Mr. Edwards: The findings you are referring to, in the hospital record here?

Mr. Studt: In the autopsy, yes.

Mr. Edwards: I mean in the hospital record?

Mr. Studt: Yes, in the hospital record, these last few pages here.

[Page 15]

Mr. Edwards: That is right.

By Mr. Studt:

Q. Now, you were present throughout the entire autopsy, is that correct, Dr. Turner?

A. Yes, sir.

Q. Now you also stated in here that the fracture of the skull followed blow applied to head posteriorly perhaps by a piece of iron pipe?

A. Yes.

Q. That is your finding?

A. That is Dr. McIntosh—

Q. Well, you concur in that finding, though, is that correct?

A. Yes—yes, it is possible, I would say it was possible for it to be a small iron pipe or something like that, in other words.

Q. In other words, was the abrasion of such shape or form that it would fit in with an iron pipe or a club or some similar object like that?

A. Yes. Now, don't put this down.

(Then followed a short discussion off of the record.)

Mr. Edwards: I think you might give us that explanation again for the record.

Mr. Studt: Well, I think he has most of that in there on your questions.

[fol. 288] The Witness: Just the different types of fractures that you can get is what I meant.

Mr. Edwards: Different types of fractures, and you

[Page 16]

came to the conclusion this was the type of fracture described in this hospital exhibit or hospital record?

A. Yes, sir, that was my opinion of it.

Mr. Edwards: Well, go ahead.

By Mr. Studt:

Q. And it is very possible then in your opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object?

A. Yes.

Q. Also in the hands of some individual?

A. Yes, it could be.

Mr. Studt: I believe that is all.

Mr. Edwards: Just a question or two.

Redirect examination.

By Mr. Edwards:

Q. This photostat copy of the hospital records, marked Plaintiff's Exhibit 1, the first page is written, you say, in your handwriting, the filled in part?

A. Yes.

Q. From the physician's report down?

A. Yes. The nurse gets this information from me.

Q. The top is filled in by the nurse and what is headed "Physician's Report" is in your handwriting?

A. Yes, sir.

Q. And the signature, W. E. Turner, Jr., is your signature?

A. Yes, sir.

Q. That is where you signed your name?

A. Yes.

[Page 17]

Q. And this record that Mr. Studt asked you about, the history and the like, is what you think may have been dictated to yourself by Dr. McIntosh and to—what is this other doctor associated with you?

Mr. Studt: Dr. Kessler?

A. Dr. Kessler I think was down there, too.

By Mr. Edwards:

Q. And you made the examination you state when the body came in St. Joseph's Hospital, and you were present when the autopsy was performed?

A. Yes, sir.

Mr. Edwards: I think that covers it.

Mr. Studt: I want to ask another question, Doctor.

Further Cross-examination:

By Mr. Studt:

Q. In other words, all your testimony here is given from this particular plaintiff's Exhibit 1 that has been presented to you and which you read, which included your physician's report and this doctor's autopsy—and the autopsy?

A. Which is correct, as far as I can remember.

Q. Yes, and the testimony that you have given here is exactly what is contained in this report, is that it?

A. Yes, yes, sir.

Further Direct examination.

By Mr. Edwards:

Q. In other words, to get it straight, Doctor, this hospital

[Page 18]

report here marked Plaintiff's Exhibit 1 is your examination and findings?

A. Yes, sir.

Q. And that is your opinion and that is given in this record?

A. Yes, sir.

Q. And one of the principal reasons for the examination at St. Joseph's Hospital was to determine the cause of death, I believe?

A. Yes, sir; yes, sir.

Q. And that is what you attempted to do, to determine the cause of Lyman Haney's death?

A. Yes, sir.

[fol. 290] Q. And the conclusions you reached were written into this hospital record?

A. Yes, sir.

Q. Doctor, you are now stationed at Fort Leonard Wood as a First Lieutenant?

A. Yes, sir.

Q. In the United States Army Medical Corps?

A. Yes, sir.

Q. You are staying temporarily over at Lebanon, Missouri, are you?

A. Yes, sir.

Q. You are married, I believe?

A. Yes, sir.

Q. Your wife lives over at Lebanon and you temporarily are making that your home?

A. Yes, sir.

Q. Now, it is rather uncertain, I suppose, where you will be stationed in the future or where you will serve, is it, Doctor?

A. I don't know where I will be tomorrow.

Q. You don't know where you will be tomorrow?

A. No.

[Page 19]

Q. You may be transferred soon to some other fort or some other station?

A. Yes, sir.

Q. In the service of the army?

A. Yes, sir.

Q. I suppose you intend to stay in the service of the United States until the war is over, Doctor?

A. Yes, sir; I suppose so; I think I will.

Q. We are just asking this for our record?

A. Yes; as far as I know.

Mr. Edwards: I think that is all.

And by agreement between counsel for plaintiff and counsel for defendants, the signature of the witness was waived and the deposition may be used with the same force and effect as if it were duly signed.

[Page 20]

[fol. 291] STATE OF MISSOURI,
County of Pulaski, ss:

I, Rufus L. Robertson, a Notary Public within and for the County of Pulaski, in the State of Missouri, do hereby certify that pursuant to the attached notice came before me at the Army Dispensary 1, Engineer Replacement Training Center, Group 6, Fort Leonard Wood, in Pulaski County, State of Missouri, W. E. Turner, Jr., who was by me first duly sworn to tell the truth, the whole truth and

nothing but the truth touching the matter in controversy aforesaid, that he was examined and his examination was reduced to shorthand writing by Joseph Feldman, a shorthand reporter of the City of St. Louis, and the signature of the witness was waived by agreement between counsel, on the day between the hours, at the place, and in that behalf aforesaid, and the testimony was transcribed into typewriting and is now herewith returned.

~~In Testimony Whereof, I have hereunto set my hand and seal this day of , A. D. 1941.~~

My commission expires July 28, 1945.

Notary Public within and for the County
of Pulaski, State of Missouri.

[Page 21]

The hospital record identified as Plaintiff's Exhibit 3 is narrated in the appellant's joint abstract of the record so that it does not give its full effect and meaning. We, therefore, set out Plaintiff's Exhibit 3, taken from the Bill of Exceptions, pages 227 to 230, inclusive.

[fol. 292]

PLAINTIFF'S EXHIBIT 3.

St. Joseph Hospital, Memphis, Tenn.

No.

Report of Emergency Case

3-5226 Mrs. Smith

12-21-39

8:10 P. M.

Name Mr. Lyman Haney

Phone 33745R

Address 37 W. McKellar

Age 48 Sex M S.D.W.

Religion Meth

Occupation Switchman

Employer I. C. R. R.

Relative Julia (wife)

Address Same

Brought by

Ambulance Thompson Bros.

Nat. Col.

Physician's Report

Temp. Pulse Resp. B. P. Lab.

Diagnosis Fractured skull,
Subdural hemorrhage

Treatment Dead when arrived

Where and How accident occurred Railroad yard, cause
undetermined, fractured skull by fast moving small round
object

Patient's general condition Deceased

What disposition was made of case: To morgue for
(Home, Ward, Referred to Dr.) autopsy

Signed W. E. Turner, Jr.

[fol. 293]

Permit for Autopsy

Memphis, Tenn, 12-21 1939

I hereby give the St. Joseph Hospital and its Representatives permission to perform an autopsy on the body of Mr. Lyman Haney.

Whose relationship to me is that of
Husband

Signed: Mrs. L. E. Haney

Witness: E. H. Mabry — Hazel Ashley R N

Autopsy # A-534

Autopsied 12-21-39

Mr. Lyman Haney

Autopsied by

Died 12-21-39

Dr. J. A. McIntosh

Assisted by Dr. Kessler

Brief History

The deceased is a white male, found dead in the railroad yard and brought to the St. Joseph Hospital.

External Examination

The body is that of a well developed, under average size male of about fifty years. There is an abrasion of the right posterior part of head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions. The right side of the face is covered with wet dirty cinders ground into the face. The lips are bruised and cinders and blood and artificial teeth are in the mouth. Balance of body surface is free of abrasions, lacerations, or bruises. The extremities are freely motile. Rigor mortis is absent.

[fol. 294]

Internal Examination

Lungs: Average size and completely fill pleural sacs; surface smooth substance crepitant and airbearing mottled black greyish red color.

Heart: Average size and normal shape, small petechial epicardial hemorrhage along course of vessels, not dissected. Aorta average size. The muscle tissues are normal in color.

Liver: Average size with patchy areas of hyaline thickening of the capsule in two areas along lower border.

Spleen: Average size.

Intestines: Negative.

Urinary Bladder: Distended with urine.

Skull: Extravasation of blood into scalp, temporal and occipital muscles adjacent to above described abrasion of head. Fracture of calvarium radiating downward from abrasion to left and right involving right parietal occipital, right and left temporal and sphenoid bones. The accompanying hemorrhage covered the cerebrum and cerebellum. The brain substance was not grossly lacerated. The spinal fluid was clear.

Anatomical Diagnosis

Traumatic fracture of skull with associated meningeal hemorrhage.

Cause of Death

The fracture of skull followed blow applied to head posteriorly perhaps by a piece of iron pipe.

Signed,

J. A. McIntosh M. D.
Pathologist

[fol. 295] JOSEPH FELDMANN, being duly sworn on the part of plaintiff, testified as follows:

Direct Examination.

By Mr. Edwards:

Q. Will you state your name?

A. Joseph Feldmann.

Q. Where do you live?

A. 5711 Lasetts, St. Louis.

Q. What business are you in?

A. Shorthand reporter, etc.

(Witness Feldmann further testified on Direct Examination, Bill of Exceptions pages 236 to 239, inclusive:)

Q. I will show you in this case, depositions filed herein on August 29th, 1941, taken at Memphis, Tennessee, on May 1st, 1941, and call your attention particularly to the testimony of witness, John Joseph Drashman, page 189, and ask you to tell the Court and jury if you took down that testimony, and if you wrote that up.

A. Yes, sir; I took all of this, and this is the transcript of my notes.

Q. All right. I show you—I will direct you particularly to witness John Joseph Drashman, will you turn to that?

A. Yes, sir.

Q. I have asked you, I believe, to go over that testimony this morning.

A. Yes, sir; I compared the testimony this morning, and what is transcribed here agrees with my notes.

By Mr. Gentry: Mr. Edwards, I suppose you are offering this only as against the Frisco Trustees?

By Mr. Edwards: That is right. I should have stated that.

Q. This deposition shows that the signatures of all of the witnesses were waived?

A. That is correct.

Q. That is by agreement between Mr. Skinker and I?

By Mr. Skinker: That is correct.

[fol. 296] By Mr. Edwards: Now, if you want me to have him read his notes of the witness' testimony as to what he testified to before him down there on May 1st, 1941, in this deposition, I will—

By Mr. Skinker: (Interrupting) It would probably be easier for him to read the typewritten transcript.

By Mr. Edwards: I want to show the correctness of this testimony filed here in Court by witness Drashman's deposition. I want to show the correctness of it. It is not signed. The signature is waived, as all of the signatures in that deposition were waived, by agreement.

By Mr. Skinker: May I examine, your Honor.

By Mr. Edwards: Yes, sir.

By the Court: You may do so.

Cross-examination.

By Mr. Skinker:

Q. You have checked the typewritten transcript of your notes?

A. Yes, sir.

Q. You find the typewriting is the same as your notes?

A. That is correct.

By Mr. Skinker: Well, we make no point in the reading from the typewriting instead of his notes.

Direct examination (Resumed).

By Mr. Edwards:

Q. I asked you this morning to read over the entire deposition of witness Drashman?

A. Yes.

Q. And to compare it with your notes?

A. Yes, sir; I did, sir.

Q. Now, tell the jury if your notes correspond to the deposition, the deposition of Drashman filed in this court.

A. They do.

Q. Are all of the statements written in this deposition, the testimony of witness Drashman, the same as your notes?

A. They are.

[fol. 297] Q. And is all that is shown in this deposition that witness Drashman testified to—did you write down that all accurately as he gave it?

A. To the best of my knowledge; yes, sir.

Q. And is this deposition correct, according to your notes?

A. Yes, sir.

Q. In every respect?

A. Yes, sir.

Q. You read the entire deposition this morning, and compared your notes with it?

A. Yes, sir; I did.

By Mr. Edwards: I am doing this to shorten it so there will be no use in reading the notes. You may take the witness.

By Mr. Skinker: No examination.

(Witness excused.)

ALVIN ARTHUR HANEY of lawful age, being produced, sworn and examined on part of plaintiff, testified as follows, to-wit:

Direct Examination.

By Mr. Edwards:

Q. Will you give us your name?

A. Alvin Arthur Haney--etc.,

(Haney further testified in direct examination, Bill of Ex. 271:)

Q. When did you first receive word that your father had been killed or injured?

A. Well, I don't know exactly the time, but my mother came down there and told me.

Q. And did you go then with your mother to the hospital?

A. Yes, sir.

Q. What hospital was that?

A. St. Joseph.

Q. Did you see your father there at the hospital?

A. Yes, sir.

[fol. 298] Q. And was he dead when you saw him?

A. Yes, sir.

Q. And did you notice—could you see any injuries where he appeared to be injured?

A. Well, on the back of his head—well, I didn't exactly look at it, because I didn't like to look at anything like that—but my wife went with me, and she looked.

Q. Don't say what she said. I don't want that. As to his face, did you see anything?

A. His face had cinders and stuff ground into his face.

Q. On which side of his face?

A. On the right side.

Q. Now, after that, did you go to the railroad yards?

A. Yes, sir.

Q. And you say it was east of that switch?

A. Yes, sir.

Q. About how far east of that Frisco switch, was it?

A. Well, it was around six or eight foot.

Q. What was the condition, tell the jury, of the ground, the height of the ground where you saw this blood, with reference to the north rail, was it higher than or lower than the north rail of the Frisco tracks?

A. It was higher.

Q. And how much higher was that than the north rail of the Frisco tracks, where the blood was?

A. Well, to the best of my knowledge, I would say it was around eighteen or two foot—eighteen inches, or two foot, something like that.

Q. Was this ground north of the tracks, was that grass or of what material was it?

A. Cinders.

Q. Cinders, or what?

A. Cinders.

Q. Now, was there another railroad track on north of this Frisco track?

A. Yes, sir.

Q. And about how far, or what is the distance between the two tracks?

A. Well, I really couldn't say for sure, but I would say it was around fifteen foot between the two, as far as I know.

Q. And did this space between this Frisco track, the north rail, and this south rail of this railroad track north [fol. 299] of it, did that height along there vary in different places?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Q. And some places it was higher than at other places?

A. Yes, sir.

Q. Did you ever work for the same road your father worked for?

A. Yes, sir.

Q. And when did you work for the—

A. I couldn't say for sure, but it seems to me like it was just about a year—the Christmas before that—Christmas.

Q. And who did you work for?

A. As far as I know, I thought I was working for the I. C. Railroad.

By Mr. Gentry: I didn't hear all of the answer—the Yazoo & Mississippi Valley Railroad, did you say?

A. The I. C., the Illinois Central.

By Mr. Gentry: I thought you said the T. M.

A. I said the Illinois Central.

By Mr. Edwards: Why do you say you worked for the Illinois Central Railroad?

A. Because that was where I got my checks, that is where I was hired.

Q. Where you were hired?

A. Yes, sir.

Q. Now, where was that, you say that is where you got them, where was that?

A. In the Grand Central Station.

Q. You mean the Illinois Central Station?

A. Yes, sir.

Q. And that is where you were hired?

A. Yes, sir.

Q. At the Illinois Central Station?

A. Yes, sir.

Q. And that is where you were paid?

A. Yes, sir.

Q. Now, were you paid by checks?

A. Yes, sir.

Q. You said that you worked for the same railroad your father worked for, how do you know that, what makes you think that?

A. Well, he got me the job, and it was right down there with him. And I got paid, as far as I remember, the same place he got paid.

Q. And did he get paid at the same place, you did?

A. Yes, sir.

[fol. 300] Q. And where was that you got your checks?

A. In the Grand Central Station.

Q. And whose office was it that you went into?

A. I don't know, sir.

Q. I mean, was there any signs on the office?

A. Well, I didn't pay any attention.

Q. But, it was in the Grand Central Station?

A. Yes, sir.

(Witness Alvin A. Haney testified Bill of Ex. pp. 283-284:)

Redirect Examination.

By Mr. Edwards:

Q. Just a question. You spoke of the ground where you saw this blood being about eighteen inches above the north Frisco rail—I believe you testified to that on direct examination?

A. Yes, sir.

Q. How did that level run back towards the Frisco switch stand?

A. It just beveled off, from a little ways up the other side of the switch until it got back to the right height.

Q. Do you mean about the same height?

A. No, sir; started from nothing and went up.

Q. Started from the track and went up to that?

A. Yes, sir.

Q. I see. Then you take where you saw this spot of blood the next morning, and go back east—rather west—towards the stand, going in that direction; would the height be about the same or different?

A. Well, it is different all along, I would say, it is just where they threw the dirt up.

Q. You mean in some places the dirt was higher and some places it was lower?

A. Yes, sir.

Q. Was the dirt generally higher from where you saw the blood back to pretty close to the switch, or to the switch back west was it about the same height; you say [fol. 301] it was different heights along there?

A. Well, I would say from about where the switch was, it was lacking about maybe a couple of feet from there starting building on up to the height.

Q. You mean about two feet around the switch was lower?

A. Yes, sir.

Q. And then the other was higher, did you mean that?

A. Yes, sir.

(Witness Hancy further testified on redirect examination by Mr. Edwards, Bill of Ex. p. 286:)

Q. If I understand you correctly then, this Frisco switch we are speaking of is within this block east of Florida Street, it is within the distance of that block?

A. Well, the only block there is between the two is Florida Street and Main Street. There is no streets between there between the railroads.

Q. Now, you have spoken about the streets, does Florida Street dead end to the railroad tracks, or is it so you can drive over the tracks there?

A. All you can do is to drive up on the tracks.

Q. It dead ends at the tracks from the north as I understand?

A. Yes, sir.

Q. So where your father was killed is that—is there a place for vehicles and automobiles to drive over that place?

A. No, sir.

Q. Is that just right-of-way and railroad tracks there?

A. Yes, sir.

Q. All railroad tracks?

A. Yes, sir.

[fol. 302] C. BRUCE FARMER, of lawful age, being produced, sworn and examined, on the part of plaintiff testified as follows, to wit:

Direct Examination.

By Mr. Edwards:

Q. Will you give us your name?

A. C. Bruce Farmer, etc.

(Witness Farmer further testified, Bill of Ex. pp. 290-291:)

Q. Just a little further describe how these mail hooks are fastened to the side of the mail cars; I mean, do they hang down, or what position are they in when not in use?

A. These mail—these catcher arms are fastened in the doorway; about halfway up the doorway on either side there is a steel rod that runs across the door, and these arms are fastened on that, so they work on a fulcrum,

and when not in use they hang down against the side of the car.

Q. That is what I am getting at.

A. And when they are in the used position they are horizontal.

Q. Now, can they swing out from the side of the car?

A. Well, yes, a slight distance.

Q. And how far can they swing out from the side of the car?

A. Oh, not to exceed a foot. I never saw one that did.

Q. And are they fastened so that as the train goes along, fastened so that the bottoms set against the trains, or the bottom will swing?

A. No, sir; they are not fastened at any place, except where they are fastened in the doorway.

Q. They can swing out then?

A. Yes, sir.

(Witness Farmer further testified on cross-examination, Bill of Ex. pp: 300-301:)

By Mr. Skinker: I hand you here a photograph which has been marked as Defendants' Exhibit C, and which pur-[fol. 303] ports to be a photograph taken in St. Louis yesterday of a Frisco mail car, down at the station, and it shows there 2054. I will ask you to look at it and ask you to state to the jury whether that shows--what is the word--catcher arm?

A. The catcher arm.

Q. The catcher arm of a mail car in ordinary position, and the type of arm you have described to the jury in your testimony?

A. Yes, sir; it does.

Q. And is that a fair and reasonable picture of the catcher arm, showing its construction and the way it is placed on the mail car?

A. Yes, sir; it is.

Q. Does that look like the catcher arms you inspected?

A. Yes, sir.

Q. And the ones you have on your cars?

A. Yes, sir.

Q. Something you want to point out about it?

A. Yes, sir; I want to point out the knob on the end of the catcher arm.

Q. Yes, sir.

A. It is possible to catch a pouch in there, and I have done it when the catcher arm was not in the proper position.

Q. But ordinarily it is through the V groove?

A. Yes, sir; but the knob is on the end either way you are going.

By Mr. Edwards: Show that so the jurymen understand what you are talking about.

By the Witness: I suggest if that is the part that hit you, it wouldn't make any difference whether you was going forward or backward, because the knob is round like that, but that is a true picture.

By Mr. Edwards: That knob is the lowest part of the arm, isn't it?

A. Yes, sir; and this door is open.

By Mr. Skinner: Now, this distance of eighty inches from the top of the rail up to the lower part of the catcher arm, is as shown there?

A. Yes, sir.

Q. And that is six feet and eight inches?

A. Yes, sir:

[fol. 304] (Witness Farmer further testified on redirect examination by Mr. Edwards, Bill of Ex. pp. 303-304, inclusive:)

By Mr. Edwards:

Q. Mr. Farmer, this catcher arm, all of these catcher arms are fastened very solid, are they not, to the train?

A. Yes, sir.

Q. Where they are fastened I mean.

A. Yes, sir; this part is solid; however, they can be slipped out of this bracket and turned around, but that part must be solid because catches are made sometimes with trains doing in excess of eighty miles an hour, and they have to be solid.

Q. Have to be very solid?

A. Yes, sir.

Q. To withstand an awful lot of pressure?

A. Yes, sir.

Q. This bottom of the catcher arm, as you have pointed out, is round, isn't it?

A. Yes, sir.

Q. About what size would that bottom be?

A. You mean what size steel it is made out of?

Q. How much in diameter?

A. Oh, it is about like that (indicating) about three inches.

Q. Between your thumb and finger, indicating about an inch and a half?

A. No, sir; it would be about three inches; that is a fair representation.

Q. I mean the extreme end; if it would drop down at the side of the car, is that the size you are indicating?

A. Yes, sir; this knob on here.

Q. That is round, isn't it?

A. Yes, sir; and that is about three inches there.

Q. And it is made of steel or some kind of metal?

A. Steel, and all I ever saw were the same shape on the end. I mean none of them was pointed because of the fact if they were pointed you might run them through a pouch.

Q. The lower part of the catcher arms are solid enough, the arm and the fastening; if it hit a man in the head it would not bend the arm, would it?

A. No, sir; I never saw an arm bent, except when you hit a bridge or a box car of some sort.

By Mr. Edwards: I think that is all.

Defendants' Evidence

[fol. 305] CLAUDE JOSEPH BRUSO, being duly sworn, on the part of defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. p. 343, 344.)

Q. Haney's next duty, after that train back in there, was to close that switch, wasn't it?

A. Yes, sir; to close that switch and go back to his shanty.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch?

A. Yes, sir.

Q. That was a custom for him to do that?

A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty?

A. Yes, sir.

Q. That is the custom, isn't it?

A. Yes, sir.

Q. Now, north of this Frisco track it is uneven, isn't it, there is cinders there?

A. Well, there is cinders on all cinder tracks.

Q. I say, there is cinders on the north of the Frisco track, isn't there?

A. There is what they call the cleanings, just been thrown back away from the track there. I suppose that little pile along there, that little pile about eighteen inches, a rough guess.

Q. About eighteen inches above the rail, isn't it those cinders?

A. Yes, sir.

G. W. CREAGH, being duly sworn, on the part of the defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 489 to 490.)

Q. How far were you from Mr. Haney when you first saw him there at that switch and stopped with the back [fol. 306] end of your train west of the Frisco switch?

A. Just a short distance.

Q. What do you mean by a short distance?

A. I suppose half the distance from here to that—to that table (indicating); maybe not that far.

Q. From you to the end of this table (indicating)?

A. Yes, sir.

By Mr. Edwards: That is about twenty feet, isn't it?

By Mr. Skinker: I judge so.

Q. Could you see him at that distance—could you see Mr. Haney how he was dressed?

A. No, sir.

Q. Was there any artificial light around there?

A. No, sir.

Q. Up over the switch or near it?

A. No, sir.

Q. Could you see whether he had any badge on his cap or on his coat from that distance, about twenty feet away from you?

A. No, sir.

J. E. MEE, being duly sworn, on the part of defendants testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 510 to 511.)

Q. You talked about having your head out; do you remember that you testified you only had your head partly out of the window in your deposition?

A. I had my head out the window just a little over like I always do, looking at the movement of the train.

Q. Looking at the back end of the train, do you remember that?

A. Yes, sir.

Q. Do you remember that you also testified that you didn't see any switch tender because you were looking at the back of the train?

A. Yes, sir.

Q. That is true, isn't it?

A. That is true.

[fol. 307] Q. You didn't see any of these switch tenders, did you?

A. No, sir.

Q. You don't know whether there was any switch tender along there, or not, do you?

A. No, I don't.

(Witness Mee again testified on Cross-examination, Bill of Ex. p. 513.)

Q. What I mean is, don't you recall testifying that if Mr. Haney had been knocked down on the ground there, you would likely not have seen him?

A. That is a fact.

Q. That is true?

A. Yes, I would likely not have seen him.

Q. There wasn't any electric light there, at the immediate switch, was there?

A. No, I don't think there was. I hadn't paid any particular attention to it.

(Witness Mee again testified on Cross-examination, Bill of Ex. pp. 514-515.)

Q. Did you look down at the ground on that occasion?

A. No, I was watching the movement of the train; I never looked down at the ground; I looked back.

Q. When you say you looked back, you mean you looked back to the rear end of the train?

A. I looked back as far as I can see the rear end.

Q. You looked back as far as you can see the rear end?

A. Yes, sir.

Q. Then you continued to look back as far as you could see on the train?

A. Certainly; and watched the gauges on the engine.

Q. You don't mean to say you know Mr. Haney wasn't lying at that switch when you passed it?

A. No, I didn't say that; I don't know nothing about it; I said I didn't see him there.

Q. After you passed Mr. Haney's switch, when you were backing up, did you look to the front of your engine, the [fol. 308] end the headlight was on?

A. The headlight was on until we got up in the yard to the station; we cut it out; but I never looked that way; when I am backing up I never look that way; what I mean, I never looked west.

Q. You never did look west?

A. No, I looked back to keep my eye on the movement of the train.

Q. From the time you got a signal to back up, from that time on until the time you backed up into the station, did you ever look back from the way you were coming?

A. You mean look—

Q. Look back to the front of the engine?

A. No, I never did; I never looked at the front.

Q. At any time?

A. No.

(Witness Mee further testified on Cross-examination, by Mr. Edwards, Bill of Ex. pp. 524 and 525:)

Q. You have seen them throw the switch and go into the shanty?

A. Yes, high ball you the switches are set with markers on them.

Q. They wouldn't go on the opposite side of the track in that case, would they?

A. No, they wouldn't.

Q. Don't you know they usually throw the switch; and either stand there or go into the shanty?

A. They throw the switch, line you up; and when the switch is lined up they give you a signal to come on; they have telephones in there to answer; they are busy, all the time.

Q. Those fellows don't walk across the track on the other side?

A. I don't know what their instructions are, but that is rule 104.

Q. They don't do that?

A. I won't say they don't do it.

Q. I am talking about what you see.

A. I am telling you about Frisco Railroad rule 104 says they must cross on the other side.

Q. How many have you seen in this yard cross to the opposite side?

A. I don't have much—there is not many switches in [fol. 309] this yard I have to observe, that is, with the switch tenders, only that "Y" switch, that one on the other side of the interlocking.

Q. Did you know Mr. Gates, the switch tender west of Mr. Haney?

A. I knew him by sight; I didn't know him personally.

Q. Did you ever see Mr. Gates at any time after he throw the switch for you to back in, walk over to the south side of the track?

A. They have got trains.

Q. Did you ever see Mr. Gates at any time walk over to the south side of the track?

A. I couldn't answer that. After he gives me a signal, I don't keep track of him.

(Witness Mee again testified on Cross Exam., Bill of Ex., pp. 528 and 529:)

Q. Was there any artificial light over the switch, or near it?

A. I didn't see none.

Q. If one had been there, you would have seen it, wouldn't you?

A. I would, I believe.

Q. You have never seen any artificial light over that switch?

A. Over the switch?

Q. Or near the switch?

A. No, near the switch I did not.

Q. No artificial light over any of those switch tender's switches, are there?

A. No, not that I know of; I don't know of any.

Q. When did you last back in over there?

A. When did I last back in over there?

Q. Over that switch?

A. There is a light there now. I didn't know what you were getting at.

By Mr. Gentry: Wait a minute; I move to strike out the answer the witness has just made voluntarily.

By Mr. Edwards: I want to find out this.

By Mr. Gentry: I want to make my motion to the Court and get a ruling.

By Mr. Edwards: I want to find out if there is any difference in the ability to see things with a light, than there would be without any.

By Mr. Gentry: I am trying to make a motion. I make the motion to strike out what the witness voluntarily said, then Mr. Edwards can state a new question if he wants to, but that was made voluntarily and should be stricken out.

By the Court: Motion sustained; that may be stricken.

By Mr. Edwards: Is there any difference with the light over this Fraisco switch stand compared without the light over it, in your ability to see there at night time?

By Mr. Gentry: Are you referring to the present time?

By Mr. Edwards: I mean conditions the same as they were when Mr. Haney's accident happened.

By Mr. Gentry: I don't get the force of your question?

Do you mean to ask him the question if a man can see better with a light than he can without a light?

By Mr. Edwards: That's right; I want to see your ability to see without a light as compared with your ability to see with a light.

By Mr. Gentry: No objection to that; everybody knows you can see better with a light than you can in the dark.

(Witness Mee testified again in Bill of Ex. at pp. 532-534:)

Q. That would be 7:30, take about 7:30 P. M. or about December 21, near the 21st, what would you say the difference is as to how far you could see an object as large as a man with the light as compared to that when you had no light at this place?

By Mr. Gentry: I have no objection to that.

By the Witness: Shall I answer?

Q. You may answer.

A. I can't answer the question because I don't know; I never made no inspection of the light and I couldn't tell you.

Q. Could you answer the same question as to your ability to see an object as small as—oh, say, a rod from one inch in diameter to three inches in diameter?

A. Could I see a rod?

Q. Yes, with the conditions the way the light was the night Mr. Haney was killed, how far would you say, with the condition the light was in that night, you could see a rod near that switch say one inch in diameter?

A. How far I could see it?

Q. Yes, with the condition of the light at that switch, how far would you say you could see a rod one inch in diameter?

A. I don't know about the light at the switch; I never made no test of the light.

Q. Could you tell me how far you could see a rod, say it was two and a half inches in diameter?

A. How far I could see a rod—how far away?

Q. Yes, how far at that switch, with the conditions the way the light was the night Mr. Haney was killed?

A. I couldn't say; I don't know.

Q. Do you think you could see an object such as I have described as far as fifty feet away?

A. I don't believe I could.

Q. Or twenty-five feet?

A. I couldn't say; I don't know.

(Witness Mee testified again at pp. 534 to 536 in Bill of Ex.:)

By Mr. Edwards: Look here, Mr. Skinker, are there any buildings in here on this "Y"? Do you know whether there are, or not? The train pulls over west (indicating) and backs in here (indicating). Are there any buildings here north of your Frisco tracks on this "Y"?

By the Witness: There is the Stratton warehouse.

Q. Is that in here (indicating)?

A. Yes, sir.

By Mr. Skinker: That is to the left.

Q. Your train backs around that?

A. Around the curve by that Stratton warehouse.

[fol. 312] Q. But there is no buildings at this "Y" outside of that switchman's shanty?

A. That is all.

Q. The switchman's shanty is the only thing on the "Y"?

A. Yes, sir.

Q. This Stratton hardware building—

A. Is on the north side.

Q. West of where you back in?

A. North.

Q. North and west; you back around?

A. Yes, you back around the "Y."

Q. How far west of this Frisco shanty—I mean this Frisco switch, is your track straight?

A. West of the "Y" switch?

Q. West of the switch where Haney was, how far west of that was your track straight?

A. I guess five or six hundred feet.

Q. Then it goes around a curve to the north?

A. Yes.

Q. Then——

A. To the west.

Q. Curves to the west?

A. You said the north.

Q. You are going west, then you curve to the north, after you get up there some distance west?

A. You go over the bridge around that same track that leads onto the bridge.

Q. But the track is straight so you can see west?

A. After you cross Kentucky street, it is fairly.

Q. Four or five hundred feet you can see west of Mr. Haney's shanty?

A. I expect you can.

Q. The Frisco track is almost straight. This engine and cars when you back around this switch that Mr. Haney tends, it immediately starts turning to go north into the station?

A. Yes, after you get to the east of the warehouse and get in the I. C. yards, it does.

By Mr. Edwards: That is all.

[fol. 313] C. J. Brusco, recalled, further testified on behalf of defendants, as follows:

Direct examination.

By Mr. Gentry:

(Bill of Ex. pp. 542-545)

Q. When a man throws a switch, no matter whether he is called a switchman or a switch tender, the train is standing and waiting for him to throw the switch, what is his next position after he throws that switch, where is he instructed to go?

A. The railroads require him to step on the other side of the track, or either back away from the switch twenty feet, I think it is.

Q. Does the switchman do one or other, depending on the local circumstances?

A. Depends on all conditions when you hit the switch. It isn't customary a man backs away all the time in switching service.

Q. But does the rule say he shall cross the track?

A. The rule says either to cross the track on the opposite side—

By Mr. Edwards: If your honor please—

By Mr. Gentry: That is all, you may examine.

Cross-examination.

By Mr. Edwards:

Q. Do you recall, Mr. Brusco, testifying that Mr. Haney's next duty was to close that switch near where you found his body?

A. Yes, sir.

Q. That was his next duty, wasn't it?

A. Yes, sir.

Q. And his duty was to close that immediately after the Frisco train had cleared it, wasn't it?

A. Yes, sir.

Q. I believe you said his duty then was to return to the shanty and turn this light over the shanty so that those engines headed north could go across the tracks?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

[fol. 314] Q. Why didn't you state the rule that Mr. Gentry talked about when I asked you in the deposition, and I asked you I believe, here at the trial the other day, what the next duty of Mr. Haney was after he had thrown that switch? Why didn't you say his duty was to step back twenty feet, or go across the tracks?

A. There wasn't anything said about the rule, you asked me what his next duty was.

Q. That's right.

A. And I answered your question.

Q. His next duty was to throw this switch back, reline it?

A. Yes, sir.

Q. You have been up here since the trial started?

A. Yes, sir; I came up here from Memphis when it first started.

Q. I believe you spoke the other day of a claim agent, what is the name of the I. C. Railroad claim agent?

A. Mr. Munson.

Q. Has he been around the court here?

A. Yes, sir.

Q. During the trial?

A. Yes, sir.

Q. Have you been talking with him?

A. Oh, yes, I have talked to him every day.

Q. Talked to him this morning?

A. Yes, sir.

Q. Who is the claim agent for the Frisco Railroad Company?

A. Mr. Westbrook.

Q. Has he been around the court room during the trial?

A. He has been around with the Frisco men.

Q. Has he been around this court room?

A. Yes, sir.

Q. Is he in the court room now?

A. No, sir.

Q. Is the other claim agent in the court room now?

A. Yes, sir.

Q. Have you talked to these claim agents since you have been here about the case?

A. Yes, sir.

Q. Those are the same two claim agents that were in conference there the next day for an hour and took pictures of this place introduced here, aren't they?

A. Yes, sir.

[fol. 315] JOHN ROBERT BURNS, being duly sworn, on part of defendant Illinois Central Railroad Company, testified as follows:

Cross-examination.

By Mr. Edwards:

(Bill of Ex. pp. 561 and 562)

Q. I show you what has been identified here as Frisco Exhibit F and ask you to look at that. Did you ever see that before?

A. I wouldn't say for sure whether I had, or not.

Q. Did you know that that contract was in existence?

A. Yes, sir.

Q. And this—the Yazoo and Mississippi Valley Company's name is not mentioned in that contract, is it?

A. No, sir, it didn't necessarily have to be.

Q. Why did you add that?

A. Because it isn't necessary.

Q. All right. Is the Yazoo and Mississippi Valley Railroad signed to this contract (handing witness a paper), to operate trains out of the Grand Central Station?

A. I wouldn't think so.

Q. Look at the other end of it.

A. It is signed by William Atwill; he was Vice-President and General Manager of the Y. & M. V.

Q. What does it say he is there?

A. Illinois Central Railroad Company.

Q. That is the way he signs that contract, isn't it?

A. Yes, sir.

Q. He signed this contract on April 18, 1935, for the Illinois Central Railroad, didn't he?

A. Yes, that's right.

Q. That was to pay two-twelfths of Mr. Haney's wages, that is, the Frisco to pay it to the Illinois Central Railroad, wasn't it?

A. Yes, sir.

[fol. 316] (Witness Burns testified again, Cross-Examination, by Mr. Edwards, Bill of Ex., pp. 564-565:)

Q. You say this Mr. Atwill, who has signed here as Vice President—

A. Vice President and General Manager.

Q. —of the Illinois Central Railroad; you say he is also an officer of the Yazoo and Mississippi Valley?

A. Yes, sir, he is of the system; he has charge of the system; he has charge of the G. S. L., the Yazoo and Mississippi Valley, and the Illinois Central.

Q. Where has your office always been, in the Grand Central Station there?

A. Most of the time, yes, sir.

Q. It is there now, isn't it?

A. Yes, sir.

Q. How long have you been in that station?

A. My office has been in the station since September, 1914.

Q. How much time did Mr. Haney lose from his work in the last six months of his life?

A. He worked pretty regular, as I recollect it; I don't know; I would have to look up the record.

Q. You heard Mrs. Haney, and checks we showed her, where he drew between \$160.00 and \$170.00 a month; that would indicate he worked every day, wouldn't it?

A. Pretty regular.

Q. Almost every day?

(Witness Alvin A. Haney testified, Bill of Ex., pp. 570 and 571:)

[fol. 317] **Plaintiff's Testimony in Rebuttal**

ALVIN A. HANEY, recalled, further testified on behalf of the plaintiff, in rebuttal, as follows:

Direct examination.

By Mr. Edwards:

Q. You were on the witness stand a few days ago, and were sworn before, weren't you, Mr. Haney?

A. Yes, sir.

Q. You testified the other day you went to this Frisco switch near where your father was killed that evening after you had gone to the hospital; tell us about what time you arrived there?

A. I imagine it was around 8:30 or 9 o'clock.

Q. You say you saw someone there?

A. Yes, sir.

Q. Do you know the name?

A. No, sir.

Q. Did they appear to be dressed as railroad men?

A. Yes, sir, they did.

Q. When you were there near that switch on that occasion, would you say whether or not you could see a thing as large as a three-inch pipe twenty-five feet away?

A. No, sir, it was too dark.

Q. You couldn't?

A. No.

Q. Of course, a one-inch pipe you couldn't see as well as a three-inch?

A. No, sir.

Q. This switch stand, when you arrived there, what was the color of the light?

A. As far as I can remember, it was green.

Q. Green?

A. Yes, sir.

Q. Did you have a flashlight with you?

A. No, sir.

Q. Did these other parties there have a light of some kind?

A. A lantern.

Q. A lantern?

A. Yes, sir.

[fol. 318] (Witness Alvin A. Haney testified again on direct examination, Bill of Ex., page 573:)

By Mr. Edwards: Three and a half or four inches in diameter, that switch stand. I will ask you if you could see underneath this green light, the stand part, when you were within twenty-five feet of it that night?

A. No, I couldn't.

Q. Now, it was the next morning that you went back there, I believe you told us?

A. Yes, sir.

MRS. JULIA B. HANEY, being recalled for further examination, testified in behalf of plaintiff in rebuttal, as follows:

Cross-examination.

By Mr. Gentry:

(Bill of Ex., p. 581.)

Q. Now, you say Mr. Brusco told you he had made his statement to the Illinois Central claim agent and if you wanted it you would have to go there to get it? That is what he said?

A. That is what he said.

(Mrs. Haney testified further on Rebuttal, Cross-examination, Bill of Ex., page 582:)

Q. Didn't he say, "Then he threw the switch after he passed over the track, he passed the time of day with me and stood on the south side of the track while the train went by and I don't know what became of him"?

A. He didn't tell me anything where Mr. Haney was standing.

Q. Didn't he tell you he saw him cross the track?

A. He did not. He didn't tell me a thing in the world.

Q. But you said he did tell you he passed the time of day?

A. Yes, sir.

Q. That was at the switch?

A. Yes, sir.

By Mr. Gentry: That is all.

[fol. 319] Redirect examination.

By Mr. Edwards:

Q. Have you testified to all Mr. Creagh did tell you on that occasion?

A. That is all I know.

Wherefore, respondent tenders this his additional abstract of the record in this case and prays that the same be accepted by this Court as such.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 320] And thereafter and on the 1st day of May, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN, ET AL., Appellants

Come now the parties, by their respective attorneys, and after arguments submit the above-entitled cause to the Court.

And thereafter and on the 4th day of June, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

WALTER A. LAVENDER, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased, Respondent

vs.

J. M. KURN and FRANK A. THOMPSON, Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a Corporation, Appellants

Appeal from the Circuit Court of City of St. Louis

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment; and that the said appellants recover against the said respondent their costs and charges herein expended, and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

[fol. 321] IN THE SUPREME COURT OF MISSOURI, DIVISION
NUMBER ONE, MAY TERM, 1945

No. 39,174

WALTER A. LAVENDER, Administrator de bonis non of the
Estate of L. E. Haney, Deceased, Respondent

vs.

J. M. KURN, ET AL., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railway
Company, Appellants

Action under the Federal Employers Liability Act, 45
U. S. C. A., Secs. 51 et seq., to recover damages for the
death of L. E. Haney. Verdict and judgment for \$30,000
went for plaintiff and defendants appealed.

Haney was a switch tender in the railroad yards at
Memphis, Tennessee, and was killed, while on duty, De-
cember 21, 1939, about 7:30 p. m. by being struck in the
back of the head by some object. If deceased was an
employee of defendants, then it is conceded the cause is
properly under the Federal Employers Liability Act.

Error is assigned (1) on the refusal of a demurrer to
the evidence; (2) on the admission of evidence; (3) on
giving plaintiff's instruction No. 2 and refusing defendant
trustees' instruction C; and (4) on an alleged excessive
verdict. One phase of the alleged incompetent evidence
is of importance in connection with the demurrer as we
shall see.

It was plaintiff's theory that Haney was the employee
of the trustee defendants *and* the Illinois Central, and that
his death was caused by being struck by a mail hook or
mail catcher arm, hereinafter for the most part, referred
to as the mail hook, swinging out from the side of a Frisco
mail car. Defendants contend that there was no substantial
competent evidence to support such theory, and it is con-
tended that Haney was not the employee of the Frisco
trustees *or* of the Illinois Central, but was the employee
of the Yazoo & Mississippi Valley Railroad Company. The
[fol. 322] demurrer raises two questions: Was there sub-
stantial competent evidence that Haney was struck by the
mail hook? and, Was there substantial evidence that Haney
was the employee of defendants?

The Frisco train involved was a passenger train, consisting of 12 cars, made up of 3 baggage cars, 1 mail car which was next to the tender; other cars were Pullmans and chair cars. The train was from Birmingham, Alabama, and its destination was Kansas City, Missouri. The Frisco tracks in the yards extend east and west and the Illinois Central tracks extend north and south. The Frisco train approached from the east, but stopped east of the Illinois Central tracks. Haney's shanty (office) was west of the Illinois Central tracks, and north of the Frisco mainline track, on which the Frisco train approached from the east. The Illinois Central's Grand Central station was about 2700 feet north of the Frisco mainline track. There was a Frisco switchstand about 200 or 250 feet west of Haney's shanty and on the north side of the mainline Frisco track, by which switch the tracks were so lined that a train could back into the Grand Central Station. In order to reach the Grand Central Station the Frisco train moved west on its mainline track until the rear passed this switchstand, and then Haney lined the switch so the train could back into the station.

The Frisco train started up from the point where it had stopped east of the Illinois Central tracks, moved west until its rear was 20 or 30 feet west of this switch; Haney, as stated, then lined the switch and the train backed east to the switch and there entered the track which turned north to the station. Rule 104, so defendants claim, required Haney, after he lined the switch, to cross to the south side of the track, and the Frisco conductor, who was standing on the rear of his train, testified that he (Haney) did so cross after he lined the switch, and the last he saw of him "he was standing south of the track." But it was Haney's duty to close the switch when the train cleared, then return to his shanty and give the green light to any train that wanted to cross the Frisco tracks. The Frisco train cleared the switch backing into the station, but the red lights at Haney's shanty remained on. Investigation was made by John Joseph Bruso, yard conductor of the Illinois Central, [fol. 323] and Haney was found unconscious on the north side of the track with a wound in the back of his head. An ambulance was called, but he was dead when the ambulance arrived at the hospital.

On the north side of the track at the switch was a mound about 2 feet in height which came up within about 3 feet

of the north rail. The overhang of the Frisco mail car was about 2 feet, hence the mound came up or extended south to a point about one foot north of the side of the mail car as it passed the switch. Based on the evidence of plaintiff's witness Farmer, *infra*, the only witness who testified about mail hooks, it could be inferred that there was a knob like iron curl or ring on the end of the mail hook on the side of the mail car which passed over the switch Haney lined, which knob, when the arm is down and resting against the side of the car, is about 6 feet 8 inches above the top of the rail, which is 7 inches high. The ties were imbedded at the switch so that the tops thereof were about level with the ground. Hence the knob at rest against the side of the mail car was 6 feet 8 inches above the ground level, or 4 feet 8 inches above the top of the mound. Haney was about 5 feet 8 inches in height, and standing on the mound the top of his head was one foot higher than the knob at rest against the side of the car. The wound was on the back of Haney's head, and, it may be inferred, about 4 inches below the top of the head, hence, with Haney standing erect on the mound, the knob was 8 inches below the place of the wound. However, as we understand, the mail hook ascends as it extends out. In stating the evidence of witnesses, we have made some omissions, appearing in the record, but we have omitted the usual signs of omission.

C. Bruce Farmer, a witness for plaintiff and referred to, *supra*, testified: "I live in Kirkwood, Missouri; am a railway postal clerk; run on the Burlington; have been running on the railroad as a railway mail clerk since 1925; last night I made some measurements of mail pouch hooks on trains; I measured a Frisco car and it was 6 feet 8 inches from the bottom of the catcher arm to the top of the ties. When the (side) door is closed, the catcher arm could swing out a little ways, and when it swung the full [fol. 324] distance it was 7 feet 3 inches from the bottom of the catcher arm to the top of the ties. With the door open (and the handle pulled down inside) it would have been 9 feet from the top of the ties. I measured another Frisco car and it (mail hook) was 6 feet 8 inches from the top of the ties. These measurements are from the top of the ties up to the bottom of the iron hanging down. In my experience I have seen the catcher arm swing out (with door closed) as far as a foot. If the door is open (and

handle pulled down) the catcher arm can swing out as far as 2 feet 2 inches, to 3 feet, but they won't swing out unless somebody pulls them up; somebody has to get hold of the handle and pull them up. They won't swing more than 12 inches without that (there was no evidence that the door was open or handle pulled down); it pivots just from the sway of the train. They won't swing any farther with the door open. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock.

"In coming into the Union Station at St. Louis, nearly all of the trains pull up and back around a curve with the back end going into the station first. I have seen that done hundreds of times. In backing in at a speed of 10 miles an hour or less over a switch, if the track was smooth, would not throw the mail catcher arm out from the bottom of the car at all, but if the track was wavy, it might. It might come out a little distance from the bottom, but ordinarily not as much as a foot from the side of the car. The mail catcher arm itself is about 26½ inches, but the bracket takes up 3½ to 4 inches and the total makes an extreme extension of about 30 inches. The bottom of the catcher arm is round and is about 3 inches in diameter. I mean the knob down at the extreme end. The end of the catcher arm which I have designated as a knob is more correctly designated as a loop. It is round, but is like a ring and curved so it won't run through a pouch." [fol. 325] J. E. Mee, engineer on the Frisco train involved and a witness for defendant, testified: "We went the length of 3 cars and a locomotive beyond that shanty (Hancey's Shanty) and stopped on a signal from the conductor on the rear of the train. I got a blast of 3 whistles on the air from the conductor to start backing up. I couldn't see the back end of the train from my position in the cab because of a curve. In starting the backward movement I always looked back at the movement of the train, turned and faced the rear end, in the direction we were going, and watched the movement of the train. That is my duty, to look down to the back and alongside my train as I start backing. We lean out of the window to do that. It is up to the engineer whether he leans out the side or looks through the rear vision window. The first cars I was

looking at would be the mail and baggage cars, and I was looking back along the north side of them and as far back as I could see. As we made that backward movement the conductor controlled the air brake on the train from the rear end of the train. We stopped the train on that occasion before we got into the station and, with his signal which I had to get from him before I could move, I started again. I could see nothing of the rear end. It was on the curve and out of sight. After stopping and getting his signal to proceed, I backed on clear into the station. I did not see Haney or any person at that switch as I approached (backing in) and passed it. I didn't see any person lying on the ground or standing up there or anybody at all near the side of my train. I was at all times looking out of my window toward the rear and past the side of the mail and baggage cars at the head of the train. I was backing around the curve to the left and north and upgrade. We were going approximately 8 miles an hour before I got the signal to stop. I suppose we backed up about 300 feet or something like that when I was stopped. After that I got another signal to back up and I backed up and continued backing on into the station.

It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches. But in this connection [fol. 326] there are two questions: Was there substantial evidence that the mail hook extended out to any extent as the mail car was backed by the mound and over the switch? and, Was there any substantial evidence that Haney, when struck, was standing at a point or place on the mound where he could have been struck by the mail hook extended as the mail car passed the switch and mound?

Both sides of the Frisco train were examined before it left the station and nothing was found extending out from the sides. As appears, supra, Brusio, yard conductor for the Illinois Central, made an investigation when the red light did not change at Haney's shanty. Brusio was the first, so far as appears, to see Haney after he was injured, and as a witness for defendants, testified that Haney was lying on his stomach, body extending north and south, and was 14 feet west of the switch; that the right side of his face was down and his head 5 feet 9 inches (determined by actual measurement) north of the north rail of the Frisco

track with the feet extending back north; that there was a small pool of blood right at his mouth; that "there was a small space where his toes had dug (south) as the weight of his body, where he fell forward. I imagine those marks were 12 or 13 feet north of the north rail of the Frisco track. They appeared to be about the length of his body back from his head as though slipped forward. I was the first one to him. There was nobody else around there that I could see anywhere at that time." There was a telephone pole "immediately north of where dragging of his feet was."

Bruso, after seeing the situation, went back east "just the other side of Haney's shanty", and called Bundy and Arnold, Illinois Central switchmen, and told them Haney was hurt, and Bundy went back to Haney with Bruso; no one was there when they arrived. Bruso further testified: "We raised up Mr. Haney's body and turned him over. When we raised him up his left hand was at his chest with his lantern in it. His right hand was on the lower part of his stomach with his pistol in his hand loose. His hand was open and his pistol in it. We turned him around to the northwest so that his head would be at the side of the mound."

[fol. 327] As a witness for plaintiff Bundy testified: "When we (Bundy and Bruso) got to the switch we found Mr. Haney lying on the ground, face down. He was north of the switch and a little to the west of it, probably 2 or 3 feet west. His head was pointed south, kind of an angle. The Frisco track runs east and west at the point. Haney's head was pointed a little south and east and his feet extended northward, kind of an angle. I would say Haney's head was about 6 feet from the switch, that is north of it, and a little to the west. * * * I saw a pistol lying under Haney's body. I think Haney was about 5 feet 10 inches in height. I would say his feet were about 10 feet north of the north rail of the Frisco track and extended straight back of him, not doubled under him. We turned him over. Before we turned him over I saw right on the back of his head a gash about 2 inches long. It was bleeding. I saw no other injury. Mr. Bruso and I were the only ones present when we turned him over. Before we turned him over I did not see his lantern or pistol. After I turned him over I saw that the pistol and lantern were under his body. When we turned him over the pistol came into

view. It indicated it might have slipped out of his pocket, and probably did. His clothing showed nothing to indicate a struggle. The Frisco train had just backed east and turned north into the station. After that Frisco train backed in, to the best of my knowledge, I would say it was 10 minutes before we went up there and found Mr. Haney's body. During that 10 minutes I had been waiting for a signal that Mr. Haney operates over in his shanty.

"The first man who came up after us to the scene was Mr. Cowan (I. C. switchman—not a witness). The two of us (Bruso and Bundy) didn't remain there very long, not over 5 minutes, if I remember right. Brusco then went and called an ambulance. We turned Haney around and I raised him up and put his head in my lap, squatted down and put his head in my lap. He was alive, but not able to talk. His face was bruised from hitting the ground. I believe the bruise was on the left side of his cheek bone and there were cinders on his face. It appears that the injury to his face was caused by hitting the cinders with his face in falling. [fol. 328] I don't think it was more than 10 or 12 minutes after the ambulance was called until it got there. In turning Haney over we turned him toward the east and turned around to the north and east, turned his head more to the north."

Alvin Haney, son of deceased, was at the Frisco switch shortly after his father was removed in the ambulance, and also went to the switch next morning. When there shortly after his father was removed, it was too dark to see well. He testified as to what he observed next morning: "From what they showed me I will say there was a spot of blood from 6 to 8 inches across. It was east of the switch and north of the Frisco tracks. I would say it was between 3 and 4 feet north of the north rail of the Frisco track and around 6 or 8 feet east of that switch."

E. L. Gates, dispatcher for the Arkansas & Memphis Railway Bridge Terminal Company, was a witness for plaintiff. He said that when he arrived Haney was on top of the mound, north of the switch, and 12 or 15 feet "due north from the north rail of the Frisco track, lying on his back with his feet toward the track, his feet nearest the track. Someone, I don't know who, was holding his head up. That mound north of the tracks near the switch was, I would say, about two feet high, that is, above the rail of the Frisco tracks. I would say it was possibly ten or twelve feet from

the mound to the north rail of the Frisco tracks. It was just loose dirt that had been thrown out there until it was built up to the height of possibly two feet, and I would say that the base of it came probably within ten feet of the north rail. That was down at the level of the ground, and then it slopes back a little to the peak of the mound. I know nothing more about the case other than that Haney was wearing a white cap and it was new or practically new, had not become soiled; and I looked at the cap and at a point on the back of it there was a dirty spot on the outside of the cap. There were no blood stains, but just a black spot, and I was told later that that corresponded with the location of the injury on the back of his head, a little to the right of the center of the head, and a little lower than the crown of the head. Possibly just a little above the top [fol. 329] of the ear. The mark on the cap was about the width of my finger and possibly an inch and a half long. It seemed like it just angled down, not across."

Dr. W. E. Turner, Jr., witness for plaintiff, testified that at the hospital he assisted in the autopsy on the body of Haney on the night he was killed and "our conclusion was that the skull was fractured by some fast moving small round object. I guess it would be possible for that small round fast moving object to be a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe."

John Joseph Drashman, Frisco coach foreman, was plaintiff's witness. Plaintiff took his deposition and when plaintiff offered the deposition at the trial, objection was made because the witness was present. Drashman testified at the trial that he went to the place of Haney's injury with the Frisco superintendent of terminals, but that Haney had been removed when he arrived. In his deposition he said he went before Haney was removed and testified as to where Haney was lying and about the wound, etc. In the deposition and at the trial he testified he examined the fireman's side of the train more carefully than the engineer's side and did so because he was told by an Illinois Central switchman that Haney "was supposed to have been struck by something protruding on the side of the train." In the deposition he said that this was told to him at the place of injury and while "Haney's body was lying on the ground."

It appears in the record that the area immediately about the switch was not very well lighted, was dark, and that at night, in this area, many hoboes and tramps, white and colored, "hop freight trains and get rides out of there." Such situation was likely the reason for Haney having a pistol. The police homicide squad made an investigation of Haney's death and the measurement referred to, *supra*, in the evidence of Bruso, was made by the police in Bruso's presence. Six days after Haney was killed his billfold was found on a high board fence railing about a block from the place where Haney was killed. It contained no money, but [fol. 330] contained Haney's social security card and other things. The billfold was not soiled; "it did not appear to have been lying out in the rain or snow." It was found near the place where Haney was placed in the ambulance. Haney had a gold watch and a diamond ring. These were "still on him at the hospital. He never carried much money, not very much more than \$10."

Plaintiff contends that the evidence of Drashman as to what was told to him by an Illinois Central switchman was competent under the rule of *res gestae*, and that under all the evidence plaintiff made a submissible case on the question as to whether Haney was struck by the mail hook. There was no evidence, expert or otherwise, that the condition of the track and the speed of the backup movement, and whatever curve there was, all considered together, might have caused the mail hook to swing out the 12 or 14 inches necessary to strike Haney, assuming, of course, he was standing on the mound and at a place where such swing out would reach him. Can such extension of the mail hook be reasonably inferred from the evidence of Farmer and all the other facts and circumstances? Would such an inference be based on speculation and conjecture? Also, there is the question, assuming that the mail hook so extended out, Was there substantial evidence that it was the mail hook that struck Haney? It would seem reasonable that if Haney was struck by the mail hook he would have fallen at least somewhat parallel to the track, but the evidence of those first to him is that when Haney was found he was some 6 feet north of the north rail and lying at right angles to the track with his head toward the track and his feet extending back north. And there was evidence that his toes had dragged forward (south) some few inches in falling, as if the blow had come from the north when he

was facing south. Alvin Haney, however, said that the blood was between 3 or 4 feet north of the north rail.

As indicated, *supra*, the competence of the evidence of witness Drashman as to what the unnamed Illinois Central switchman told him about it being supposed that Haney was struck by something protruding on the side of the train is of importance in connection with the demurrer to the evidence. As stated, plaintiff contends this evidence is competent under the rule of *res gestae*. Many cases are cited on the *time* element in *res gestae*, but for such element [fol. 331] ment we will assume without deciding, that the evidence as to lapse of time is sufficient under the rule of *res gestae*. It is not claimed that the unnamed switchman who made the statement to Drashman was speaking from his own knowledge, but from what he had heard. In other words, the *statement itself* claimed to be competent under the *res gestae* rule was based on *hearsay*. Can such, under any circumstances, be competent under the rule of *res gestae*? We do not think so.

In the brief counsel say: "Statements of strangers ordinarily classed as hearsay will be admitted as *res gestae* if they are made as a part of the transaction and so closely connected therewith that the witness has no time to reflect or to make up a story that is not true." In support of such contention many Missouri cases are cited. Among these are *Roach v. Kansas City Public Service Company* (Mo. Sup.), 141 S. W. (2d) 800; *Pryor v. Payne*, 304 Mo. 569, 263 S. W. 982; *Brinkley v. United Biscuit Co., et al.*, 349 Mo. 1227, 164 S. W. (2d) 325; *Sconce v. Jones*, 343 Mo. 362, 121 S. W. (2d) 777. We have examined all the cases cited by plaintiff and find that in each case the statement held competent under the *res gestae* rule was made by one having first hand information. We find no case where it has even been contended that a statement based on hearsay, as in the present case, may be competent under the rule of *res gestae*. It is true that the *res gestae* rule of evidence is an exception to the hearsay rule, but this does not mean that what we may term the *res gestae* evidence may be based on hearsay. This is quite clearly indicated in the *Sconce* case, *supra*, in which, and in dealing with the *res gestae* rule, it is said (121 S. W. (2d) 1 c. 781):

"The principal reason for excluding testimony as to statements made by others out of court is that the test of cross examination, of the person making them at the time they are

made, is unavailable as a safeguard against falsification or inaccuracy. This is the basis of the hearsay rule. The statements, herein involved, must come in, if at all, under the classification of the exception (*res gestae*) of the hearsay rule, which under certain circumstances permits testimony as to *statements, made by a person involved in or present at an accident* (italics ours), declaring the circumstances of an injury at or after its occurrence."

[fol. 332] We think it quite clear and therefore rule that the statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestae* rule.

A court should never withdraw a question from the jury unless all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusion from the facts which condition the issue. *Courtney v. Ocean Accident & Guaranty Corporation*, 346 Mo. 703, 142 S. W. (2d) 858; but it is well settled that verdicts may not be based on conjecture and speculation. *Hamilton v. St. Louis-San Francisco Ry. Co.*, 318 Mo. 123, 300 S. W. 787; *Mullen v. Lowden et al.*, 344 Mo. 40, 124 S. W. (2d) 1152; *Lappin v. Prebe et al.*, 345 Mo. 68, 131 S. W. (2d) 511; *Federal Cold Storage Co. v. Pupillo*, 346 Mo. 136, 139 S. W. (2d) 996, l. e. 1001, and cases there cited. Also, it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury. *Mullen v. Lowden et al.*, *supra* (124 S. W. (2d) l. e. 1156).

With the hearsay eliminated, we think that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook, and we are constrained to rule that plaintiff failed to make a submissible case on that question. And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. It will not be necessary to rule other questions. The judgment should be reversed, and it is so ordered.

John H. Bradley, Commissioner.

Dalton, C., concurs.

Van Osdol, C., concurs.

Per Curiam:

The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the judges concur.

[fol. 333] And thereafter and on the 18th day of June, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KUEX et al., Appellants

Comes now the respondent, by attorney, and files his motion for a rehearing in the above-entitled cause or to transfer said cause to the Court en Banc, together with suggestions in support of said motion, with service shown.

Which said motion for rehearing or to transfer to Court en Banc and suggestions in support thereof are in words and figures following, to-wit:

[fol. 333] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1

[Title omitted]

RESPONDENT'S MOTION FOR REHEARING OR TO TRANSFER TO
COURT IN BANC AND SUGGESTIONS IN SUPPORT THEREOF
Filed June 18, 1945

Comes now Walter A. Lavender, Administrator d. b. n. of the Estate of L. E. Haney, Deceased, plaintiff-respondent, and respectfully moves the Court to set aside its judgment and opinion heretofore rendered and entered reversing the judgment against appellants herein and to grant plaintiff-respondent a rehearing and reconsideration thereof or a transfer of this cause to the Court in banc, for the following reasons, to-wit:

[fol. 334] 1. Plaintiff-respondent is entitled to a rehearing and reconsideration of this cause, because this Court in deciding this cause overlooked matters which were fully submitted and which were decisive of this cause.

2. The rulings of this Court are in direct conflict with controlling decisions of this Court.

3. This opinion in holding that the statement of the Illinois Central switchman was hearsay and was not competent under the res gestae rule is erroneous and contrary to the facts developed. In arriving at this conclusion the opinion ignores all plaintiff's evidence and the reasonable inferences to be drawn therefrom, and arrives at its conclusion based entirely upon argumentative and self-serving statements by appellants, and not based on evidence.

4. The opinion of the Court is in error in holding, that with the so-called hearsay evidence as to the cause of the death of Haney eliminated, that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook; and in ruling that plaintiff therefore failed to make a submissible case on that question. The Court ignores, in this opinion, all evidence of plaintiff and reasonable inferences to be drawn therefrom and adopts as a matter of law self-serving statements, speculation, hearsay and conjecture asserted in appellant's brief.

5. This opinion errs in reversing the judgment against appellants and in holding that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Hancy. Such holding is not based upon the evidence. It ignores plaintiff's evidence and reasonable inferences to be drawn therefrom and adopts as a matter of law assertions by appellants in their brief and is thus in direct conflict with other and prior cases from this and the Federal Courts, [fol. 335] among the latest being: *State ex rel. K. C. P. S. Co. v. Bland*, 187 S. W. 2nd 211 (Mo.), and *Mutual Ben. Health Co. v. Francis*, 148 Fed. 2nd 590 (C. C. A. Mo.).

6. In upsetting and reversing the verdict of a jury and the ruling of the trial court in refusing to grant a new trial, this opinion is attempting to weigh evidence and to deprive respondent of his right to a trial by jury. It therefore ignores many cases decided by this court in division and in banc and fails to follow the last controlling case from the United States Supreme Court in a Federal Employers' Liability case, to-wit: *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 1 c. 411.

7. By depriving plaintiff of his right to a trial by jury this opinion violates the Federal and State Constitutions and their amendments.

8. The opinion of this Court, in depriving plaintiff of his judgment, abridges the privileges and immunities of plaintiff and deprives him of his property without due process of law, and of the equal protection of the law, and deprives him of speedy remedy in courts of justice; all in violation of the Constitutions of the United States and of the State of Missouri and their amendments.

Wherefore, plaintiff-respondent respectfully moves this Court to set aside its judgment and opinion and to grant plaintiff-respondent a rehearing and reconsideration thereof or to grant plaintiff-respondent a transfer of this cause to the Court in banc.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 336]

SUGGESTIONS

I

Res Gestæ—Hearsay

The Commissioner's opinion holds:

"The statement of the switchman that Haney was supposed to have been struck by something protruding on the side of the train was not competent under the *res gestæ* rule" (p. 12).

This conclusion disregards respondent's evidence and relies entirely on appellants' argument as to the evidence adduced, thereby disregarding the rulings of this Court that all doubts and inferences must be resolved in respondent's favor.

The opinion states that the only evidence on this point is as follows:

"Drashman, plaintiff's witness, testified: 'He was told by an Illinois Central Switchman that Haney was supposed to have been struck by something protruding on the side of the train'" (p. 9).

On the strength of this word "supposed," the opinion reverses the finding of the jury and court, on the ground that such statement was on its face hearsay, and therefore did not come within any of the long line of authorities cited by respondent. This conclusion ignores the real evidence that the switchman actually saw the condition. It likewise ignores the fact that this witness Drashman was an employee of appellants and was an open, adversary and very hostile witness to respondent, but who, nevertheless, had to admit the following:

"* * * I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

[fol. 337] By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir" (Resp. Add. Abs. 54).

Defendants would not permit their employee to explain. The witness testified again (Resp. Add. Abs. 67):

"Q. You said a moment ago that the man who made the statement that something sticking out from the

train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

Again at page 67 of the Abstract the same witness said:

"Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir."

The opinion concedes (p. 10) that the testimony "is of importance," and that as it was "based on hearsay" it was incompetent (p. 11), and continues that it has examined all of the many cases cited by respondent, but "find no case where it has even been contended that a statement based on hearsay, as in the present case, may be competent under the rule of *res gestae*" (p. 11), citing the *Sconce* case, 121 S. W. 2d, l. c. 781, permitting the *res gestae* exception to the general hearsay rule "where the statement is made by a person present at an accident." We submit all the proof is clear that the statement was made by the Illinois Central switchman who was "present at an accident," to the effect that:

"I heard some say that is what happened. That is true? Yes (Resp. Add. Abs. 54).

[fol. 338] "The man who made the statement, something sticking out from the train hit Haney was an Illinois Central switchman" (Resp. Add. Abs. 67).

In refusing to sustain the discretion of the trial court in admitting this evidence this court ignores and overrules its prior decisions in the following cases:

- Rosenzweig v. Wells, 308 Mo. 617, 273 S. W. 1071;
- Johnson v. Southern Railway Co., 351 Mo. 1110, 175 S. W. 2d 802;
- Redmon v. Metropolitan Street Ry. Co., 185 Mo. 1, 84 S. W. 26;

Ruschenberg v. Southern Electric R. R. Co., 161 Mo. 70, 61 S. W. 626;

Barker v. St. L. I. M. & S. Ry. Co., 126 Mo. 143, 28 S. W. 866;

Laundau v. Travelers Ins. Co., 305 Mo. 563, 267 S. W. 376;

And many other cases cited in our brief.

II

Substantial Evidence Supported Finding Haney Was Struck by the Mail Hook

The Commissioner's opinion holds (p. 12) that after the so-called hearsay is eliminated, there is mere speculation and conjecture to hold that Haney was struck by the mail hook and that plaintiff failed to make a submissible case on that question.

We submit such holding ignores all respondent's evidence and overrules and fails to follow all previous decisions of this Court in similar cases.

The evidence conclusively shows:

1) That Haney was alive and well immediately before appellants' train passed, where his duty required him to be;

[fol. 339] 2) That immediately thereafter Haney was found dead from a wound in the back of his head, which could have been caused by the swinging mail hook;

3) That there was a mail hook swinging loose from the side of the train, which could have hit Haney where he was located; and

4) That there was not a scintilla of evidence that anything else in the world could or did hit Haney except such mail rod; and

5) That no reasonable man could draw any other conclusion from the facts adduced; and

6) That a jury of 12 reasonable men so concluded; and

7) That the Trial Court sustained their finding.

Wherefore, we submit, a judge of an appellate court should not conclude that as a matter of law all other men are unreasonable, unfair and arbitrary.

A short review of the evidence, not merely appellant's contention, shows the conclusions reached by the opinion are not well founded, and have absolutely ignored all of respondent's proof.

The opinion at page 5 holds that it could be inferred that Haney could have been struck by the mail arm if he were on the mound south of the track and if the mail hook extended out as far as 12 or 14 inches. The opinion uses the following language, to-wit:

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches" (Op. p. 5).

But at page 10 the opinion concludes that there was no evidence that the mail hook could extend out as far as 12 or 14 inches, saying:

[fol. 340] "There was no evidence, expert or otherwise, that the condition of the track and the speed of the backup movement, and whatever curve there was, all considered together, might have caused the mail hook to swing out the 12 or 14 inches necessary to strike Haney, assuming, of course, he was standing on the mound and at a place where such swing out would reach him. Can such extension of the mail hook be reasonably inferred from the evidence of Farmer and all the other facts and circumstances? Would such an inference be based on speculation and conjecture?"

In coming to such conclusion the opinion ignores even the testimony it quotes at a previous page that there was evidence to support such finding, i.e.:

"In my experience I have seen the catcher arm swing out (with door closed) as far as a foot" (Op. p. 4).

Here is factual evidence that even with the door closed the arm swings out as far as a foot.

The opinion proceeds:

"If the door is open (and handle pulled down) the catcher arm can swing out as far as 2 feet 2 inches, to 3 feet, but they won't swing out unless somebody pulls

them up; somebody has to get hold of the handle and pull them up. They won't swing more than 12 inches without that (there was no evidence that the door was open or handle pulled down); it pivots just from the sway of the train. They won't swing any farther with the door open. I have never seen those catcher arms swing out without any force from the mail operator more than one foot from the side of the car, and that would ordinarily be going around a curve or at an excessive speed of the train so that it would rock" (Op. p. 4).

Again we have the specific evidence that even with the door closed, "in going around a curve * * * the arm [fol. 341] pivots just from the swing of the train" not "more than 12 inches."

The opinion comments here that there is no proof that the door was open. Likewise there is no proof it was closed, but that it is usually open in coming into a station. The train was in appellant's exclusive control. Absent any evidence to the contrary, the inference is that it was open.

There is ample evidence that the train was backing around a curve.

The opinion (p. 5) quotes Engineer Mee as testifying that:

"I couldn't see the back end of the train from my position in the cab because of a curve. * * * I could see nothing of the rear end. It was on the curve and out of sight."

Now, the opinion does hold that (Op. p. 5):

"It could be inferred from the facts that Haney could have been struck by the mail hook if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

Therefore, it is plain even from the evidence quoted above that the last half of this formula was properly developed, i.e., that "the mail hook extended out as far as 12 or 14 inches."

Despite this undisputed evidence that the hook did extend 12 or 14 inches, the opinion continues to assert (Op.

p. 6) that there was no evidence that the mail hook extended out 12 inches, because after the accident, when the train was not in motion, or going around a curve, "nothing was found extending out from the sides." But there was no evidence that it was not extending out when it struck and killed Haney. Not a railroad witness testified that he examined the hook and that there was no blood or [fol. 342] hair on same. Such failure to testify certainly raises an unfavorable inference. The train was in the control of appellants.

The doctor who made the post mortem testified that the injury causing death was

"Caused by a fast-moving small round object" (Resp. Add. Abs. 94-96)

which could have been

"A rod or something projecting out from a train that was going 8 or 10 miles an hour."

Other witnesses testified to the same effect that the grab iron could have extended out far enough to strike Mr. Haney.

Witness Drashman testified (Resp. Addl. Abs. p. 81):

"Q. Can that be extended out to the side of the train? A. Yes.

Q. How far out to the side of the train can that mail hook be extended? A. You can wing it out three feet.

Q. Swing out three feet? A. To the tip end of the hook."

Witness Gates testified on cross-examination by Mr. Skinker (Resp. Addl. Abs. p. 18):

"Q. The overhang of an ordinary passenger train is, roughly, two to two and a half feet, isn't it, somewhere in that neighborhood, the overhang of the train? A. Yes, sir.

Mr. Edwards: You mean to the side of the rail?

Mr. Skinker: Yes.

Q. (By Mr. Skinker) It extends beyond the rail? A. Yes, it would be about, I guess, twenty-four to thirty inches.

Q. Twenty-four to thirty inches? A. Yes."

[fol. 343] The opinion (page 3) seems concerned with the measurements of Haney and whether the hook could have struck him in the head where it did.

We find that while the opinion is in error in stating the figures, by reason of one slight omission of seven inches, it nevertheless seems to concede that under those circumstances the grab hook could have hit Haney where the wound was found as the opinion says that "However as we understand the mail hook ascends as it extends out." This concession undoubtedly takes care of the seven inches eliminated in the court's figures, but for accuracy's sake we call attention to the fact that where the opinion states, when the arm is down it is 6 feet 8 inches above the top of the rail which is 7 inches high and that while the ties were imbedded level with the ground, the knob at rest was 6 feet 8 inches above the ground or 4 feet 8 inches above the top of the mound. This of course is inaccurate as in figuring the 6 feet 8 inches above the ground the court has overlooked the fact that this 6 feet 8 inches was figured above the rail which was 7 inches above the ground, therefore, this figure would properly be 87 inches above the ground or 5 feet 2 inches above the top of the two foot mound instead of 4 feet 8 inches. Therefore, with these figures carried out accurately, the place where the rod struck Haney in the back of the head figures out mathematically to within an inch to the exact place where he was actually struck in the back of the head which was 3 or 4 inches below the top of Haney's head (Resp. Addl. Abs. p. 79, pp 109-113 and 59).

The opinion states that the evidence shows that Haney's body was lying six feet north of the north rail of the Frisco track, but fails to state that witness Bundy estimated the distance between five and five and one-half feet.

Witness Bundy testified on cross-examination by Mr. Skinker (Resp. Addl. Abs. p. 28):

[fol. 344] "Q. How far was his head north of the north rail of the track? A. I would say about five feet, five foot and a half."

The opinion likewise ignores other evidence which shows plainly and definitely that the wound on Haney's head was made by an instrument such as the mail grab iron of the passing train and that it was a long narrow wound across the base of the back of the head in a slanting position, as would be caused by the rod moving upwards and striking from left to right as the train passed him. In other words, a glancing blow from the lower to a higher position, and ranging from left to right.

Witness Gates testified (App. Abs. p. 29):

"In speaking of Mr. Haney's cap, I observed the dark spot on the back of it. As well as I can recall, it was about half an inch wide, or maybe a little wider, and about an inch and a half long. It looked like it might have been at a place about the center of the head, a little to the right and a little below the center of the head, but I would say above the ear. I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back."

In describing the mark on the outside of the back of Mr. Haney's cap, Witness Gates testified (Resp. Addl. Abs. p. 19):

"A. Well, it—it's where I think something struck it; just what and where and how I couldn't say, just what it was; but it was something come in contact there, in my opinion.

Q. And it left those dark marks on the cap that you describe? A. Yes, sir."

Again (Resp. Addl. Abs. p. 16):

"Q. No blood on the inside? A. No, sir, no blood stains, but just a black spot. And I was told later [fol. 345] that that corresponded with the location of the injury on his head.

Q. On the back of his head? A. Yes, sir."

Witness Gates again testified (Resp. Addl. Abs. p. 17):

"Q. Could you describe a little better this cap, this black spot on the cap, how large it was? A. It was

about the width of my finger and possibly an inch and a half long.

Q. About the width of your finger, and your finger is about a half inch thick, isn't it? A. Possibly so.

Q. And about two inches long? A. An inch and a half, something like that.

Q. About an inch and half long? A. Yes.

Q. And did that run horizontal across the cap? A. I don't recall now just the exact manner, but it seemed like there was bars across down this way, that it struck not across, but kind of at an angle, downward like."

Under such circumstances the holding of this opinion is squarely in conflict with previous decisions of this Court holding that such evidence is amply sufficient to support a plaintiff's verdict, in the cases of:

In *Whittle v. Thompson* (Mo.), 179 S. W. 2d 22, a mere licensee was struck by an unfastened swinging door of a refrigerator car in a passing train while plaintiff was walking along a path near railroad.

In *Evans v. Missouri Pac. R. Co.*, 342 Mo. 420, 116 S. W. 2d 8, l. c. 9, 10, this court says:

"Under the rule above stated, we think this makes a *prima facie* case for the respondent, as under the circumstances an inference of fact arises showing negligence."

In *Noce v. St. Louis-San Francisco Ry. Co.*, 337 Mo. 689, 85 S. W. 2d 637, l. c. 639, this Court says:

"The essential conditions of a *res ipsa* case are present. The facts shown make out a case coming [fol. 346] within the category of falling objects and similar occurrences, such as objects protruding from passing trains or cars, to which the *res ipsa* rule has been generally applied."

In *Hicks v. Mo. Pac. R. R. Co.*, 64 Mo. 430, this court upheld a verdict where:

"A piece of timber with which one of the cars was loaded, projecting over the side of the car from

twenty inches to two feet, struck plaintiff and broke his nose and otherwise injured him" (l. c. 432).

And the many other cases cited in our brief.

This opinion is in direct conflict with the late decision of the United States Supreme Court in a federal railway employers case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, where Mr. Justice Murphy, in speaking of the requirement that a verdict must be sustained, says:

"If that requirement is met as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors" (l. c. 411).

In reversing the lower court for adopting appellant's theories instead of those most favorable to the respondent, the court continues (l. c. 412):

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that uncertain inferences. The focal point of judicial review the proof gives equal support to inconsistent and view is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, [fol. 347] and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; *Tiller v. Atlantic Coast Line R. Co.*, supra, 318 U. S. 68, 63 S. Ct. 451, 143, A. L. R. 967; *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions

or because judges feel that other results are more reasonable."

To the same effect is *Brady v. Southern Ry Co.*, 320 U. S. 476, 64 S. Ct. 232, a federal employers' liability case, where Mr. Justice Black, at page 237, says:

"Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results."

This dissent was concurred in by Justice Douglas, Murphy and Rutledge.

We submit the same situation exists here.

The next finding of the opinion as to lack of evidence is as to (Op. p. 6) "was there any substantial evidence [fol. 348] that Haney, when struck, was standing at a point or place, on the mound where he could have been struck by the mail hook extended as the mail car passed the switch and mound?"

The evidence shows that it was Haney's duty to be at the switch where he was killed.

Witness Brusco testified (Resp. Addl. Abs. p. 117):

"Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

Witness Arnold testified (Resp. Addl. Abs. p. 31):

"Q. You would give such a signal after you have thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up then next what would you do? A. Close the switch."

As to Being South of the Track

The opinion at page 2 states that defendant's rule 104 required Haney to cross to the south side of the track and that the Frisco conductor testified he saw Haney cross to the south side of the track after he lined the switch, and the last he saw of him, he was standing south of the track. We fail to see what importance the Commissioner attaches to this so-called presumption which vanished on the appearance of factual testimony to the contrary. The conductor's testimony as to the statement of whether Haney was north or south of the track before the train started to back into the station vanished when his testimony is read in connection with his admission that he remembered very little about the affair and didn't remember Haney [fol. 349] going to the south of track. Mrs. Haney testified, page 159 of the Abstract, to the effect that the conductor had told her:

"He said his memory wasn't so good. He said he didn't remember anything about my husband going to the south side of the track; he didn't know where he was standing or anything about it; and he couldn't remember; he didn't see him afterwards."

Referring to the next line of the opinion to the effect that Haney's duty required him to be under Rule 104 on the south side of the track, we find this so-called presumption likewise vanishes into thin air in view of appellants' own witness Brusco, where he testified that Haney's duty was to remain at the switch on the north side of the track, and that that was the custom and practice.

He testified in Respondent's Additional Abstract, page 117, as follows:

"Q. Haney's next duty, after that train backed in there, was to close that switch, wasn't it? A. Yes, sir; to close that switch and go back to his shanty.

Q. And he should have done that after the train backed in there, immediately after the train cleared the switch? A. Yes, sir.

Q. That was a custom for him to do that? A. Yes, sir; that was his duty.

Q. His duty to open the switch and remain there until the train backed in, and then go back to his shanty? A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

To the same effect is the testimony of witness Arnold, appearing at page 31 of Respondent's Additional Abstract, as follows:

"Q. And then after giving such a signal to back up—that is a signal to back up you are talking about? A. Yes, sir.

[fol. 350] Q. You would give such a signal after you have thrown the switch and opened it? A. Yes, sir.

Q. Then what would you next do? A. Well, you would just stand there and wait until the train got back.

Q. Backed up, you mean? A. Yes, sir.

Q. And when the train backed up then next what would you do? A. Close the switch."

As to Haney's Body Lying at Right Angles To the Track

The opinion herein concludes that Haney could not have been struck by the mail arm projecting from the train because his body was found "lying at right angles to the track with his head toward the track and his feet extending back north" (Op. p. 10). We submit that this conclusion is not based on fact. The evidence is, and the opinion concedes, that the point where Haney's body was found, being the same point where he was required to be pursuant to his duty, was on the inside of a curve, and the testimony of the various witnesses from which the Commissioner draws his conclusion must be explained with reference to which part of the curve in the track each witness referred. It must be recalled that the main line of the Frisco Company was exactly east and west; that the switch of the Illinois Central entering into their depot was practically north and south. Haney was stationed at the beginning of the curve. When a witness testified that his head was to a track, did he mean the track running east and west,

or did he mean the track running north and south? If the witness described the body as lying approximately east and west, if he were referring to the main track, the body would have been exactly parallel to the main track, but would have been at right angles to the Illinois Central switch track. If, on the other hand, he had described [fol. 351] the body as lying with his head south, and his feet north, then the body would have been parallel to the I. C. switch track, but at right angles to the Frisco main line.

It is piling conjecture upon conjecture for this opinion to say that the twelve jurors and the trial court did not reconcile these differences and apply them to the facts at bar, and it is more logical to believe that they were not acting in an arbitrary and unfair manner when they decided that there was no law of physics which would preclude a man's body from being thrown or falling in any particular manner when he was struck a slanting upward blow across the back of the head and jerked off his feet by the mail grab hook of a swiftly moving train, and thrown almost lifeless to the ground. How can this Court now take a slide-rule and figure exactly how and in what manner the body of a man would fall under such circumstances and deprive that man's dependents of a recovery granted them under the Federal law and by twelve jurors and a trial judge, and say that such people were not reasonable men?

We submit likewise that there is no testimony in the case upon which such conclusion can be based. The actual testimony is to the contrary, to wit:

Witness Bundy, at page 25 of Respondent's Additional Abstract, testified that Haney's head was pointing to the southeast, testifying in the following language:

"Q. His head was pointing, as you say, southeast?

A. Yes, sir.

Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.

Q. Into the station? A. Yes, sir."

This would certainly prove that the body of Haney was lying parallel to the track and not at right angles.

Witness Drashman testified Haney's head was toward the west, but that he could have been facing east, saying as follows (Abs. p. 71):

[fol. 352] "I believe the head was toward the west and he was lying on his face with his back up if I remember right, but I am not sure, because I didn't pay that much attention to it. He could have been facing east."

Whereas in Respondent's Additional Abstract, page 76, he testified that Haney's body was about six feet from the Frisco Company track, that is the main east and west track and that the body was lying parallel to the track, and that he thought Haney's head was to the west but he was not quite sure of that fact, testifying, as follows:

"Q. Well, did you see Haney's body down there?
A. Yes.

Q. And how far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks?
A. I did not measure that.

Q. What would be your best judgment? A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to?
A. Well, I think the whole body.

Q. The whole body. And which way was Haney's head pointing when you first saw it? A. I believe it was west.

Q. Pointed west. And was he lying on his back or on his face or side or how? A. On his face, if I remember right.

Q. Lying on his face? A. Yes.

Q. With his back up? A. Yes.

Q. And you think his head was faced west? A. Yes.

Q. Are you sure about that? A. No, I am not sure. I think it was.

Q. Well, I just want to know if you are reasonably sure. A. No, I am not sure, because I didn't pay that much attention to it.

Q. He might have faced east then? A. Yes, he could have been."

[fol. 353] The opinion states that the evidence shows that Haney was dragged toward the track. This was error.

Witness Bundy testified (App. Abs. p. 34):

"There was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern."

The opinion attempts to give appellants' witness Bruso's version of the matter as to tracks and distances found by witness the day following the accident.

Witness Bruso testified (App. Abs. p. 113):

"I didn't make any mark the night before that where I found Haney, because I was never back there any more after I found him. I was there only just a few minutes that night, when I found his body, not any more than 3 or 4 minutes or 5 anyhow, and it was dark around there. I did not see the tracks that night, but I saw them the next morning."

This is very direct and positive evidence by Appellant's witness who was adverse and hostile to plaintiff-respondent, to the effect that Haney's body was parallel to the main track and not at right angles as concluded by the opinion.

Witness Bundy, at page 27 of Respondent's Additional Abstract, testified that he turned Haney's body over to the north and around to the north and east with the head to the north. This manipulation of Haney's body shows that the body had been changed by Bundy so that after others came up, the body might have been at right angles to the main track but parallel to the Illinois Central switch track, but that the testimony of those who saw the body later would not have been based upon the original condition of the body. It likewise shows that the body may have been dragged or scuffed along the ground by these witnesses [fol. 354] themselves and therefore, the dragging marks seen by other witnesses may or may not have been made by Haney being dragged over the ground by the mail arm. Certainly no other assumption is tenable unless we follow into the realms of fancy suggested by appellant's counsel, to the effect that possibly some robbers may have knocked him down and then for some unforeseen reason have tried

to wait until they could be discovered and took up the time, while waiting, by dragging the body along the ground and at the same time, leaving the watch, ring and money in Haney's pocket. This testimony is set out at page 27, as follows:

"Q. When you turned him did you just turn him over or carry him some distance? A. We turned him over to the left.

Q. Turned him over to the north? A. And turned him around.

Q. To the north and east? A. Yes, sir.

Q. And you say you turned him around? A. Yes, sir.

Q. And how did you turn him, which direction did you turn his head? A. North.

Q. Turned his head more to the north? A. Yes, sir.

Q. Did you turn him so that his head was pointing more north than east? A. I believe it was; yes, sir."

Again at page 34 Bundy stated that "there was no evidence of Mr. Haney having been dragged on the ground. I had a good bright electric lantern."

At Abstract, page 36, witness Arnold testified: "I think Haney's body was about straight north of the Frisco switch." Bundy testified to the same effect (Abs. p. 28):

"Q. How far was his head north of the north rail of the track? A. I would say about five feet, five-foot and a half."

[fol. 355] We, therefore, submit that there is no evidence to justify the Court's conclusion that the body was at right angles to the track, and so could not have been struck by a grab iron extending from the side of the mail car.

AS TO THE POCKET BOOK

The opinion states at pages 9 and 10 that Haney's pocket book was found six days after his death, about a block away, but contained no money and that it was not soiled.

This evidence was evidently offered by appellants to in some way justify their unsupported theory that possibly Haney had been murdered, that the robbers had taken the pocket book, taken the \$10.00 out of it and dropped it a

block away from the scene of the accident. However, they do not explain why these hypothetical robbers left Haney's watch and ring on his body and kept the pocket book for a week before dropping it, about a block from the accident where it had not been in the rain or snow and it was not even soiled. The opinion does state, at page 10, that it was found near where Haney was placed in the ambulance. We believe the best inference to be drawn therefrom would be that the pocket book had not been taken from Haney but had fallen from his pocket when he was placed in the ambulance, picked up and put on a brace where it was found by witness Scott and a colored man on a fence protected by a roof overhead (App. Abs. 138). It certainly does not support the theory of robbery.

Evidence on this point is as follows:

Witness Bundy testified (App. Abs. p. 34):

"They carried him on a stretcher of some kind from the point where I was holding him out to Florida Street to the ambulance. I noticed he had his watch on. It was a gold watch, was intact and was in the watch [fol. 356] pocket in his pants. I did not look for any ring or for his pocket book, and don't know whether he had them or not. When he was taken away, I went back to my crew."

III

PLACE OF WORK WAS UNSAFE

The opinion (p. 12) in 3 lines, without any explanation of the issues, the law, or the facts, holds that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. It thus ignores completely the liability of defendant Illinois Central to furnish its employee a safe place to work.

Plaintiff's 3rd Amended Petition charged defendant Illinois Central failed to furnish its employee a safe place to work, in that (Abs. p. 5):

"Plaintiff further states that defendant Illinois Central Railroad Company was guilty of negligence which caused or contributed to cause the injury and death of

said Lyman Elmer Haney, in the following respects, to-wit:

"1. In negligently failing and refusing to furnish Lyman Elmer Haney with a reasonably safe place in which to work and perform the duties assigned to him and which he was required to do, in that the ground was high and uneven near said switch and the light was insufficient and inadequate and the backing train had some object, rod or stick projecting or swinging out to the side near said switch.

"2. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with reasonably sufficient light at the place where he was required to work so that said Lyman Elmer Haney could see and could be seen and thereby be reasonably safe in doing the work required of him to be done by defendants.

[fol. 357] "3. In negligently failing and refusing to furnish and provide said Lyman Elmer Haney with proper and safe equipment to do the work required of him to be done, as alleged and set out in assignments of negligence numbers 1 and 2 herein.

"4. In negligently furnishing and providing a place for said Lyman Elmer Haney to work which was unsafe and dangerous as described and set out in assignments of negligence numbers 1, 2 and 3 herein."

In arriving at the conclusion that it was safe for Haney to work in the dark and walk over high and uneven mounds of cinders, the opinion ignores the evidence that it was so dark the Engineer could not see Haney.

The evidence as to lack of light is as follows:

Witness Mee testified in Respondent's Additional Abstract, page 123:

"Q. Could you tell me how far you could see a rod, say it was two and a half inches in diameter? A. How far I could see a rod—how far away?

Q. Yes, how far at that switch, with conditions the way the light was the night Mr. Haney was killed?
A. I couldn't say; I don't know.

Q. Do you think you could see an object such as I have described as far as fifty feet away? A. I don't believe I could."

Alvin Haney testified on behalf of plaintiff that he was at the switch where his father was killed soon afterwards and it was so dark he could not see a 3-inch pipe 25 feet away (Resp. Addl. Abs. p. 129):

["Q. When you were there near that switch on that occasion, would you say whether or not you could see a thing as large as a three-inch pipe twenty-five feet away? A. No, sir, it was too dark.

Q. You couldn't? A. No.

Q. Of course, a one-inch pipe you couldn't see as well as a three-inch? A. No, sir."

[fol. 358] And again, at page 130 of Respondent's Additional Abstract:

"By Mr. Edwards: Three and a half or four inches in diameter, that switch stand, I will ask you if you could see underneath this green light, the stand part, when you were within twenty-five feet of it that night? A. No, I couldn't."

Witness Creagh, defendant's conductor, testified (App. Abs. p. 144):

"The first time I saw Haney he was, I suppose, about ten feet from me. I could not see how he was dressed, as there was no artificial light around there. I could not see whether he had any badge on his cap or coat when he was 20 feet away from me. * * * I couldn't see whether Haney was wearing a hat or a cap because I didn't pay any attention to what he had on his head nor did I see whether he had any pistol on him."

Witness Bruso testified (App. Abs. p. 121):

"The red light on the switch designates the switch stand, but I could not see the stand until I got about 20 or 30 feet from it, and I could see the form of the body there. I did not know at that time who it was until I got up there."

Witness Drashman testified (Resp. Addl. Abs. p. 79):

“Q. Is there a mound north of the Frisco tracks there at the switch? A. Well, there may be what you call a mound; there is a pile of dirt piled up there.

Q. And where is this pile of dirt with reference to the switch, which way from it? A. I don't know.

Q. Is it north or south? A. I don't know, I don't know just where that switch is, I didn't pay any attention to it.

Q. Do you know how high that mound of dirt is? A. Well, I imagine about two feet above the rail.

[fol. 359] Q. About two feet above the rail. And about how long does that extend along there? A. Oh, several feet.

Q. Does it extend east and west of the switch? A. Both east and west of the tracks, yes.”

Witness Alvin Haney testified (Resp. Addl. Abs. pp. 110-111):

“Q. What was the condition, tell the jury, of the ground, the height of the ground where you saw this blood, with reference to the north rail, was it higher than or lower than the north rail of the Frisco tracks? A. It was higher.

Q. And how much higher was that than the north rail of the Frisco tracks, where the blood was? A. Well, to the best of my knowledge, I would say it was around eighteen or two foot—eighteen inches, or two foot, something like that.

Q. Was this ground north of the tracks, was that grass or of what material was it? A. Cinders.

Q. Cinders, or what? A. Cinders.

Q. Now, was there another railroad track on north of this Frisco track? A. Yes, sir.

Q. And about how far, or what is the distance between the two tracks? A. Well, I really couldn't say for sure, but I would say it was around fifteen foot between the two, as far as I know.

Q. And did this space between this Frisco track, the north rail, and this south rail of this railroad track north of it, did that height along there vary in different places? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. And some places it was higher than at other places? A. Yes, sir."

Witness Brusco testified (Resp. Addl. Abs. p. 117):

"Q. Now, north of this Frisco track it is uneven, isn't it, there is cinders there? A. Well, there is cinders on all cinder tracks.

[fol. 360] Q. I say, there is cinders on the north of the Frisco track, isn't there? A. There is what they call the cleanings, just been thrown back away from the track there. I suppose that little pile along there, that little pile about eighteen inches, a rough guess.

Q. About eighteen inches above the rail, isn't it, those cinders? A. Yes, sir."

It is thus shown that it was so dark that neither witness Alvin Haney nor appellant's witness Mee could have seen a three-inch pipe 25 or 50 feet distant. Defendant's witness Creagh, the conductor, could not see how Haney was dressed 10 feet away.

Defendant's engineer Mee further admitted that he did not see Haney as his train backed past the place where Haney was or had been waiting for the backing of the train, because the witness was looking towards the back of his train and did not look down toward the ground and would not have seen Haney had he either been lying or standing at the place where he was struck.

He testified at page 119 of Respondent's Additional Abstract as follows:

"Q. Did you look down at the ground on that occasion? A. No, I was watching the movement of the train; I never looked down at the ground; I looked back.

Q. You don't mean to say you know Mr. Haney wasn't lying at that switch when you passed it? A. No, I didn't say that; I don't know nothing about it; I said I didn't see him there."

Again at page 119:

"Q. What I mean is, don't you recall testifying that if Mr. Haney had been knocked down on the ground there, you would likely not have seen him? A. That is a fact.

Q. That is true? A. Yes, I would likely not have seen him."

[fol. 361] Plaintiff pleaded in his petition a separate and distinct cause of action against appellant, Illinois Central Railroad Company, alleging, among other things, as shown hereinabove, that the place where Haney was required to work was unsafe and dangerous because the ground was high and uneven and there was inadequate light.

Plaintiff's case was submitted to the jury as against the defendant Illinois Central Railroad Company under plaintiff's instruction No. 4 (App. Abs. pp. 166-168). It will be noted that instruction No. 4 did not require the jury to find that Haney was struck by a mail hook or any object extending or swinging out beyond the side of the train. This, of course, was not a necessary element for the jury to find in order to find that the place was unsafe and dangerous. The Illinois Central Railroad makes no complaint against plaintiff's instruction No. 4 because that instruction gave a correct definition of the law and was not erroneous.

This instruction shows the theory upon which plaintiff tried his case as against the Illinois Central Railroad Company. He was entitled to try his case on the same theory in this Court on appeal as he had tried it in the lower court.

This court in its opinion has not given plaintiff a full and fair hearing and decision as to his case against the Illinois Central Railroad. This court should have stated the issues between this plaintiff, the respondent, and the Illinois Central Railroad Company, one of the appellants. It should then have made a fair and honest finding of the facts of the plaintiff's case against the Illinois Central Railroad Company and the opinion should have made a finding and statement of the law as to the facts and issues against the Illinois Central Railroad Company.

This opinion does not make a finding on the issues, evidence and law as to the Illinois Central Railroad.

[fol. 362] The case is ordered reversed as to the Illinois Central Railroad Company in the opinion by a short cryptic conclusion and statement to the effect:

"And we also rule that there was no substantial evidence that the uneven ground and insufficient light

were causes or contributing causes of the death of Haney."

Plaintiff has not had his day in court as against appellant Illinois Central Railroad.

The only thing necessary to be established by the evidence under the Interstate Commerce Laws was that the negligence of the Illinois Central Railroad Company in failing to furnish Haney with a safe place to work in whole or in part caused his death.

How can this court say that the negligence of the Illinois Central Railroad Company in failing to furnish sufficient light (a safe place to work) did not, as a matter of law, in part cause his death?

Plaintiff's instruction No. 4 told the jury that it was the duty of the Illinois Central Railroad to exercise ordinary care to furnish Haney with a reasonably safe place to work and to keep and maintain the place where Haney was required to work reasonably safe. One of the elements required by instruction No. 4 to be found was that the ground was high and uneven and that the light was inadequate. It would have been sufficient for this instruction to have required the jury only to have found that the light was inadequate in order for the place to be unsafe and dangerous. It has been so held by this court and the Court of Appeals that the insufficiency of light is sufficient to establish an unsafe place to work.

The one sentence on the last page of the opinion which holds that plaintiff was not entitled to go to the jury as against the Illinois Central Railroad without naming that appellant was not a decision as is contemplated by Chap- [fol. 363] ter 2, Title 45, U. S. Code, Section 51, and under the provisions of the Constitution of the State of Missouri. We submit that this Court erred in reversing the judgment as to appellant Illinois Central Railroad without giving its reasons in a written opinion on the issues, facts and law.

A master's duty and liability in respect to furnishing sufficient light for his servant is governed by the general rule applicable to furnishing of safe place to work, that is, master must exercise reasonable care and skill so that place to work shall be reasonably safe.

King v. City of St. Louis, 155 S. W. 2d 557, l. c. 561:

"We do not believe that the principles announced in the above cases require us to hold as a matter of law

that defendant in the case at bar was free from negligence. The duty and liability of the master in respect to furnishing sufficient light for his servant is governed by the general rule applicable to the furnishing of a safe place to work, that is, the master must exercise reasonable care and skill to the end that the place in which he requires his servant to work shall be reasonably safe. 39 C. J. 350. In determining whether the master has fulfilled his duty in this respect in any particular case, it is a firmly established rule of law that such question must be left to the determination of the jury where the circumstances and surroundings of the case are such that reasonable minds might differ on the question."

In action by circus employee for injuries sustained in removing equipment on account of falling into hole caused by removal of tent stake, evidence of employer's negligence in failing to provide and maintain sufficient lights held for jury.

Reynolds v. Al. G. Barnes Amusement Co. (Mo. App.), 300 S. W. 1062, 1 e. 1063:

"It was defendant's duty, under the circumstances in evidence, to use reasonable care to see that the [fol. 364] lights in question were so placed as to render plaintiff's place of labor reasonably safe, and a failure so to do was negligence. The fact that the omission may have occurred through the fault of its servants and agents charged with said duty will not release defendant from liability. And this observation applies as well to the question of filling and tamping the stake hole as to the failure to furnish sufficient light. *Lampe v. Am. Ry. Exp. Co.* (Mo. App.), 266 S. W. 1009, and cases therein cited.

"In our prior opinion we held that although a petition alleges several specific acts of negligence, it is not necessary to prove all of them, but at least one, sufficient to cause the injury, must be proved. *Meeker v. Union Electric Co.*, 279 Mo. 574, 216 S. W. 923. However, there was evidence to sustain both of the above-mentioned charges, and the jury well could say that they combined to help bring about the injury. Under these circumstances, the case was properly sent to the jury, and there was no error in refusing to give

the instruction in the nature of demurrers to the evidence. We find no reversible error of record.

"The judgment is affirmed."

This case was affirmed by the Supreme Court of Missouri in Bane in the case of *State v. Trimble*, 300 S. W. 1064.

In the *Reynolds* case quoted from above, it was held that the failure to fill the stake holes on the circus grounds was sufficient to show an unsafe place to work and the failure to furnish light was another ground of failing to furnish a safe place to work.

The Court held that the case should have been submitted to the jury on both grounds, but that there was sufficient evidence to support a verdict on either one of the grounds.

We have the same situation in the case at bar. There was sufficient evidence to show that the place was unsafe because of inadequate light.—There was also sufficient [fol. 365] evidence to show that the place was unsafe because the ground was high and uneven.

Plaintiff's instruction No. 4 required the jury to find both that the ground was high and uneven and that the light was inadequate in order to find that the place was unsafe and dangerous.

Although there was no evidence that Haney was murdered the opinion indicates the circumstances point to this conclusion and the opinion fails to state that there was no evidence of any struggle or any weapon used to murder Haney.

Witness Bundy testified (App. Abs. p. 32):

"I did not see any club or pipe or weapon of any kind. I saw a pistol lying under Haney's body. * * *

His clothing showed nothing to indicate a struggle."

Witness Bruso testified on behalf of defendants (App. Abs. p. 114):

"I saw no evidence of any struggle, and I saw no pipes or clubs or anything around where I saw Haney's body."

Even though there had been some scintilla of proof that Haney had been killed by robbers (which is specifically denied), defendants would still be liable, if the place was dark and unsafe, under the doctrine laid down in the case hereinafter set out.

Yard conductor's complaint for injuries sustained when he unintentionally surprised and was shot by gang engaged in car breaking and robbery in railroad yard, alleging that railroad "knowingly" maintained conditions in railroad yard, tempting thieves, robbers, and desperadoes to resort thereto for looting, robbery, car-breaking, etc., and making yard an unsafe place for railroad employes to work in, and that railroad with knowledge of such [fol. 366] conditions failed to remedy them, held sufficient to state cause of action as against contention that unlawful acts of the criminals was intervening cause.

Green v. Atlanta & C. Air Line Ry. Co. (Sup. Ct. of So. Carolina), 126 S. E. 441, 1. c. 444:

"But, where it appears that the master has actual knowledge of conditions within his control which conduce to expose a servant in the performance of the master's work to danger from the lawless acts of third persons, and that the intervention of such illegal acts of third persons is a consequence reasonably to be expected from the maintenance of such conditions, a different case is presented. In the case at bar it is alleged that the conditions rendering the servant's place of work unsafe were 'knowingly' maintained; that defendants had actual notice of the danger from the intervention of the lawless acts of third persons; and that the unsafety of the place of work from that source was recognized by the defendants as a condition calling for remedial action. Proof of that state of facts would, we think, clearly warrant the inference that the lawless act of the third persons which resulted in injury to the servant was a consequence within the actual contemplation of the defendants and was not such a consequence as could not reasonably be expected to follow in natural and ordinary sequence from the original act or omission upon which the actionable negligence is predicated. If the intervention of the lawless acts of third persons was by virtue of the defendants' knowledge of the situation, a consequence reasonably to be expected, it was not a consequence too remote to entail liability, for 'that which is reasonably to be expected will be regarded as both proximate and natural, although it may be considerably removed.' *Harrison v. Berkley*, 1 Strob. 525,

549 (47 Am. Dec. 578). In that state of the facts there remains no tenable basis for a conclusion that, merely because the act which results in, or concurs as an efficient cause in producing, the injury was [fol. 367] illegal in character, and was an act for which independent third persons were also liable as tortfeasors, the alleged negligence of the defendants was thereby insulated, and the causal connection broken. If the intervention is reasonably to be expected, and hence is to be regarded as a natural and proximate consequence, the fact that it consists in wrongful misconduct for which third persons might also be held legally responsible furnishes no sound reason, as we apprehend, for declining to apply the logical and well-established doctrine that an intervening cause, brought to bear by an independent, responsible human agency, will not break the causal connection, if such intervening cause was induced, produced, or set in motion by the negligence charged to the original wrongdoer. 22 R. C. L. 134, Section 19; *Foster v. Union*, *supra*.

"In the view indicated, the demurrer to the complaint was properly overruled."

We respectfully ask this Honorable Court to grant Respondent a rehearing or to transfer this cause to the Court in banc.

Respectfully submitted, N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

[fol. 369] And thereafter and on the 2nd day of July, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent for a rehearing in the above-entitled cause or to transfer said cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled.

And thereafter and on the 17th day of July, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Comes now the respondent, by attorney, and after obtaining leave of Court files motion for leave to file a motion to modify the opinion in the above-entitled cause, with service shown.

Which said motion for leave to file motion to modify the opinion in said cause is in words and figures following, to-wit:

[fol. 370] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1, MAY TERM, 1945

No. 39174

WALTER A. LAVENDER, Administrator de Bonis Non of the
Estate of L. E. Haney, Deceased, Respondent.

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco Rail-
way Company, Debtor, and Illinois Central Railroad Com-
pany, Appellants

MOTION OF RESPONDENT FOR LEAVE TO FILE MOTION TO MODIFY
OPINION

Comes now respondent in the above entitled cause and moves the Court to grant him leave to file respondent's motion to modify opinion in the above entitled cause and for grounds of this motion, respondent states:

The present rules of this Court are silent as to the time allowed for filing a motion to modify an opinion that before the last amendment was made in the rules of this Court, the rules provided and it was a custom to file a motion to modify an opinion after motion for re-hearing and to transfer to Court In Banc had been passed upon by the Court.

Respondent further states that its Counsel assumed that the old rules and custom was still in force and that they could file a motion to modify after the over-ruling of their motion for rehearing and to transfer to Court In Banc in this case and accordingly prepared a motion on behalf of respondent to modify opinion served a copy on Counsel for appellants, and forwarded same to the Clerk of this Court.

Wherefore, respondent prays that the Court grant him leave and permission to file respondent's motion to modify [fol. 371] opinion at this time which said motion is now in custody of the Clerk of this Court.

N. Murry Edwards, James A. Waechter, Douglas H.
Jones, Attorneys for Respondent.

Received copy of foregoing motion of respondent, etc., this 16th day of July, 1945.

M. G. Roberts, C. H. Skinker, Jr., Attorneys for Frank A. Thompson, sole trustee of the St. Louis-San Francisco R. R. Co., Appellant. Watts & Gentry, Attorneys for Appellant, Illinois Central Railroad Company.

And said motion to modify the opinion, which is now in custody of the Clerk of this Court, is in words and figures following, to-wit:

[fol. 371] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1

[Title omitted]

RESPONDENT'S MOTION TO MODIFY OPINION

Comes now Respondent in the above entitled cause and moves the Court to modify its opinion filed herein on June 4, 1945, in the following respects and for the following reasons, to wit:

I

By stating and setting out on Page 1 of the opinion, between the third and fourth paragraphs, the issues made up as to negligence by the pleadings as against each appellant. The charge of negligence in respondent's petition against appellant trustees, is that while:

"Said Lyman Elmer Haney was standing near said switch, the defendants, J. M. Kurn and John G. Lonsdale, [fol. 372] trustees, etc., negligently caused, suffered, and permitted a rod, stick, or some other object to project out, or swing out from the side of said Frisco passenger train and to strike said Lyman Elmer Haney."

The allegations in plaintiff's petition as to negligence against the appellant, Illinois Central Railroad Company is that that Company was guilty of negligence which caused or contributed to cause the injury and death of said Lyman Elmer Haney by failing to furnish said Lyman Elmer Haney with a reasonably safe place in which to work in that the ground was high and uneven near said switch and that the light was insufficient and inadequate and that said Illinois Central Railroad Company negligently furnished and provided a place for Haney to work which was unsafe and dangerous.

Appellants' answers are general denials.

(a)

By further stating in the opinion on Page 1, that the issue of negligence against appellant trustees was submitted to the Jury by plaintiff's instructions, #1 and #2.

These instructions submitted to the Jury the question as to whether or not Haney was injured and killed by a rod or other object extending, swinging out or projecting beyond the side of the Frisco passenger train.

The case was submitted to the Jury as against the appellant, the Illinois Central Railroad Company, under plaintiff's instructions #3 and #4. These instructions submitted to the Jury the question of whether the Illinois Central Railroad had furnished Haney a safe place to work. Instruction No. 4 required the Jury to find that at the place where Haney worked and was required to work, the ground was high and uneven and the light was insufficient and inadequate and that by reason thereof, the place was unsafe and dangerous and that the failure, if any, of said defendant [fol. 373] constituted negligence and the instruction further directed the Jury that if Haney was injured as a direct result of said place being unsafe and dangerous, they should find for plaintiff and against the defendant, Illinois Central Railroad. Instructions #3 and #4 did not require the Jury to find that Haney was killed by any object projecting out beyond the side of the train. No objection has been made by the Illinois Central Railroad to the giving of instructions #3 and #4.

The above instructions #1, #2, #3, and #4 given at the request of plaintiff appear in appellant's abstract of record, at Pages 163 to 168.

Therefore, this Court should modify the opinion as above suggested so that it will show that separate issues were tried and submitted to the trial Court and Jury as to each appellant.

II

By inserting in line 30 from the top of page 2 of the opinion, between the word "to" and the word "close," the words "stand there and," so that it will read, "But it was Haney's duty to stand there and close the switch when the train cleared, etc.," and by inserting in the 29th line from the top of page 2, after the word "track," the following: "Mrs. Haney testified that the Frisco conductor told her he did not know where Haney was standing."

The evidence shows it was Haney's duty to open this switch and stand there until the train had backed in and

then close the switch (Resp. Add'l and Abs. p. 117). Witness Bruce testified:

"Q. That was the custom for him to do that? A. Yes, sir, that was his duty.

Q. Is that to open the switch and remain there until the train backed in and then go back to his shanty?

A. Yes, sir.

Q. That is the custom, isn't it? A. Yes, sir."

[fol. 374] Witness Arnold testified to the same thing (Resp. Add'l Abs. p. 31).

This shows that it was Haney's duty to be near the switch where he was killed.

Mrs. Haney testified the conductor told her after the accident that his memory wasn't good; that he didn't remember anything about Mr. Haney going to the south side of the track and didn't know where Haney was standing because he didn't see him afterwards (App. Abs. p. 159). This shows that the conductor was mistaken about Haney going to the south side of the track.

III

By inserting in the sixth line from the top of page 3, after the word "feet," the words and figures "or 30 inches," so that it will read, "The overhang of the Frisco mail car was about 2 feet or 30 inches, etc."

Witness Gates testified that the overhang of an ordinary passenger train was two to two and one-half feet or 24 to 30 inches to the side of the rail. This shows that the mail hook extends out two and one-half feet to the side of the car instead of two feet, as stated in the opinion (Resp. Add'l Abs. p. 18).

IV

By striking out of line 13 on page 3 of the opinion the word "top" and inserting in place thereof the word "bottom." So that it will read, "which knob, when the arm is down and resting against the side of the car, is about 6 feet 8 inches above the bottom of the rail, which is 7 inches high."

The evidence shows when the mail hook was hanging down on the side of the car, the bottom of the hook was 80 inches from the top of the ties or bottom of the rails

(App. Abs. p. 97). This amendment of the opinion to [fol. 375] form to the evidence will place the lower end of the mail hook 7 inches closer to the ground than the opinion now has it, and therefore more likely to strike Haney.

(a)

By inserting at the end of the third line from the top of page 9, "I think it was where something struck it, just what it was I couldn't say, but it was something that came in contact there, in my opinion. The mark was on the outside of the cap and in the back."

Witness Gates testified to the above. This tends to show that the mail hook struck Haney in the back of the head on the outside of his cap (App. Abs. p. 29).

V

By inserting and adding at the end of line 23 from the top of page 9 of the opinion that Witness Drashman also testified to the following:

" * * * I heard someone say that is what happened.

Q. Did you so testify? A. Yes.

Q. And that is true, isn't it? A. Yes.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir."

Defendants would not permit their employee to explain. The witness testified again:

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that?
A. I suppose it was a switchman, I don't know who it was. * * *

Q. You said a moment ago that the man who made the statement that something sticking out from the [fol. 376] train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

The statement was made by the Illinois Central switchman who the evidence indicates was "present at an accident," to the effect that:

"I heard some say that is what happened. That is true? Yes. The man who made the statement, something sticking out from the train hit Haney, was an Illinois Central switchman."

The testimony quoted above is taken from the record (Resp. Add'l Abs. pp. 54, 55 and 67).

This shows that the I. C. switchman was present when Haney was struck because he said that is what happened. He did not say that he heard that was what happened. The opinion by only stating that Haney "was supposed to have been struck by something protruding on the side of the train" does not give plaintiff the most favorable benefit of the evidence which he is entitled to under the law. It does not give plaintiff the benefit of the most favorable inferences to be drawn from the evidence to which he is entitled.

VI

By striking out the figure "6" in the 22nd line from the top of Page 10 in the opinion and inserting in place thereof the figure "5" and by stating after the word "North" in line 24 from the top of Page 10, that Witness Drashman testified that Haney's body was lying parallel to the Frisco tracks.

[fol. 377] Witness Bundy testified on cross-examination (Resp. Add'l Abs. p. 28):

"Q. How far was his head north of the north rail of the track? A. I would say about five feet, five foot and a half."

Witness Drashman testified (Resp. Add'l Abs. p. 76):

"Q. Well, did you see Haney's body down there? A. Yes.

Q. How far was it from the Frisco switch, from the main line? A. I don't know, I didn't measure it.

Q. Well, how far was it from the Frisco tracks? A. I did not measure that.

Q. What would be your best judgment? A. About six feet.

Q. About six feet. Do you refer to the body or the head or what part of Haney's body would you refer to? A. Well, I think the whole body."

This shows that Haney was lying parallel to the tracks, not at right angles, as the opinion now states.

VII

By stating at the end of the sentence in line 20 from the top of Page 12 of the opinion, that the evidence tended to prove that the ground at the switch where Haney was killed, was high and uneven, that there was no artificial light at the switch and that it was so dark there that a three-inch pipe could not be seen 25 feet away, that Witness Craegh testified that he could not see how Haney was dressed at the switch ten feet away.

The above appears in the record of the abstracts of this appeal at Respondent's Additional Abstract pages 79, 129 and 130 and Appellants' Abstract page 144.

This will show that there was sufficient evidence to submit the question of an unsafe place to work as to appellant Illinois Central Railroad Co. to the jury.

[fol. 378]

VIII

All of the modifications and amendments asked for in this motion are supported by the record and are material to the issues and the respondent believes that he is entitled to have this opinion show the true state of facts, as indicated herein, so that he may seek to have this opinion reviewed by the United States Supreme Court

Respectfully submitted, N. Murry Edwards, James
A. Waechter, Douglas H. Jones, Attorneys for
Respondent.

[fol. 380] And thereafter and on the 4th day of September, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent, }

vs.

J. M. KURN et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent for leave to file a motion to modify the opinion in the above-entitled cause, doth order that said motion be, and the same is hereby overruled for the reason that such motion must be filed within the time allowed for motion for rehearing.

And thereafter and on the 11th day of September, 1945, the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E.
Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Appellants

Comes now the respondent, by attorney, and files a motion to withhold the mandate and stay further proceedings in the above-entitled cause, with service shown.

Which said motion to withhold the mandate and stay further proceedings is in words and figures following, to-wit:

[fol. 381] IN THE SUPREME COURT OF MISSOURI, DIVISION
No. 1, MAY TERM, 1945

No. 39,174

WALTER A. LAVENDER, Administrator de Bonis Non of the
Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. KURN et al., Trustees of St. Louis-San Francisco
Railway Company, Debtor, and Illinois Central Railroad
Company, Appellants

MOTION OF RESPONDENT TO WITHHOLD MANDATE AND STAY
FURTHER PROCEEDINGS

Comes now respondent in the above entitled cause and moves the Court to withhold sending a mandate to the trial court and stay all further proceedings in the above entitled cause until such time as the Supreme Court of the United States shall pass upon respondent's application for a writ of certiorari and for grounds of this motion, respondent states that the respondent intends to make application in the United States Supreme Court to have the opinion and judgment in the above entitled cause in this Court reviewed and reversed by the United States Supreme Court.

N. Murry Edwards, James A. Waechter, Douglas H. Jones, Attorneys for Respondent.

Received a copy of foregoing motion of respondent, etc., this 10th day of September, 1945.

C. H. Skinker, Jr., A. P. Stewart, Attorneys for Frank A. Thompson, sole trustee of the St. Louis-San Francisco R. R. Co., appellant. Wm. R. Gentry, Attorney for Appellant, Illinois Central Railroad Company.

[fol. 382] And thereafter and on the same day the following further proceedings were had and entered of record in said cause, to-wit:

No. 39174

WALTER A. LAVENDER, Administrator of Estate of L. E. Haney, Deceased, Respondent,

vs.

J. M. Kurn et al., Appellants

Now at this day the Court having seen and fully considered the motion of the respondent to withhold the mandate and stay further proceedings in the above-entitled cause, doth order that said motion be, and the same is hereby sustained.

STATE OF MISSOURI, Sect.:

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify that the foregoing pages contain a full, true and correct copy of the record and proceedings in a cause entitled Water A. Lavender, Administrator de bonis non of the Estate of Lyman Elmar Haney, Deceased, respondent, against J. M. Kurn and Frank A. Thompson, Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, as fully and completely as the same appear of record and remain on file in my office.

I further certify that the respondent's motion to modify the opinion is a full, true and correct copy of the original motion, which is now in my custody.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, State aforesaid, this 20th day of September, 1945.

Marion Spicer, Clerk of Supreme Court of Missouri.
(Seal.)

[fol. 383] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1945

No. —

WALTER A. LAVENDER, Etc., Petitioner,

vs.

J. M. KURN, et al., Trustees, Etc.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon consideration of the application of counsel for the
petitioner,

It is ordered that the time for filing a petition for cer-
tiorari in the above-entitled cause be, and the same is hereby,
extended to and including November 2, 1945.

Wiley Rutledge, Associate Justice of the Supreme
Court of the United States.

Dated this 24th day of September, 1945.

[fol. 383] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(2285)

pany, a corporation (Defendants), Appellants, being No. 39,174 of causes on the docket of said Supreme Court of Missouri (R. 320-331), reversing the judgment of \$30,000.00 (Thirty Thousand Dollars) and costs of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of your petitioner and against the respondents herein (Respondents), which said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 2nd day of July, 1945, by the overruling by that Court of petitioner's motion for a rehearing and to transfer said cause to the Supreme Court of Missouri in banc (R. 368). Upon application of your petitioner this Honorable Court did, on September 24, 1945, enter its order that the time for filing a petition for certiorari in this cause be, and the same was ordered extended to and including November 2, 1945.

OPINION OF THE COURT BELOW.

The opinion of Division No. 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. 2nd, at page 253, and appears on pages 320 to 331 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by Evelyn Burke, as Administratrix of the Estate of L. E. Haney, Deceased, against J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, Debtor, on the 15th day of November, 1940, in the Circuit Court of the City of St. Louis, Missouri, under the Federal Employers' Liability

Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the alleged wrongful death of said deceased, resulting from injuries sustained by him while in the employ of defendants J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, as a switch-tender.

Thereafter, on the 22nd day of October, 1942, plaintiff filed in the Circuit Court in said case a second amended petition in which Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased, was named as Plaintiff and the Illinois Central Railroad Company was named as a defendant in addition to the defendant Trustees. Said new defendant Illinois Central Railroad Company was thereafter duly served with summons and plaintiff did thereafter file in said cause his third amended petition to which said petition defendant Trustees and defendant Illinois Central Railroad Company did file separate answers which said answers were general denials.

Petitioner's third amended petition and complaint upon which this cause was tried charged that L. E. Haney was employed by the defendants as a switch-tender in throwing, setting and regulating switches for railroad cars and trains in the switchyard of the Grand Central Station at Memphis, Tennessee, on or about December 21, 1939; that he was ordered, directed and required by the defendants to throw or open a switch so that defendant trustees could back an interstate Frisco passenger train from Birmingham, Alabama, into the Grand Central Station at Memphis, Tennessee; that the said L. E. Haney did in performance of his duty and as a servant of defendants on said last-mentioned date, open a switch and that defendants' trustees did back said long interstate Frisco passenger train over the track and switch which said Haney had opened past Haney and past the place where Haney was standing near said switch and that as said interstate passenger train backed past Haney, defendant trustees negligently caused,

suffered and permitted a rod, stick or other object to project out or swing out from the side of the said Frisco passenger train and to strike said Haney knocking him to the ground and injuring him so severely that he died as a direct result of said injuries on the 21st day of December, 1939. Petitioner's complaint against defendant Illinois Central Railroad Company charged that said Railroad Company as the employer of L. E. Haney, the deceased, negligently failed to furnish Haney with a reasonably safe place to work, in that the ground where he was required to work was high and uneven and the light insufficient and inadequate and that the backing train had an object or rod sticking or swinging out to the side as it passed Haney and that said place was unsafe and dangerous.

At the beginning of the trial, defendant trustees' counsel made the following admissions on behalf of defendant trustees (R. 16-19), describing the work the deceased was doing at the time he was injured and killed as follows:

"3. That on and prior to December 21, 1939, Lymon Elmer Haney was employed by the Illinois Central Railroad Company, or a subsidiary corporation thereof known as the Y. & M. V. Railroad Co., as a switch-tender in the railroad yards near the Grand Central Station at Memphis, Tennessee. That his duties included the throwing of switches for said railroad, and also the Frisco and other railroads using the Grand Central Station; and that for his said services the said Frisco Trustees agreed with the Illinois Central Railroad Company to and did reimburse said Railroad Company for two-twelfths (2/12ths) of said Haney's wages."

It was shown that the Illinois Central Railroad Company owned and operated the Grand Central Station, and the passenger terminal at Memphis, Tennessee (R. 190-204).

Ora L. Young, witness for the defendants, testified that at the time Haney was injured and killed, he was working as Superintendent of Terminals for the Frisco Railroad at Memphis, Tennessee; that under a contract between the two railroads pertaining to the use of the Grand Central Station and passenger terminal at Memphis, Tennessee, the Illinois Central Railroad sent monthly bills to and which were paid by the Frisco at the rate of \$1.87 1/2 for each Railroad car switched into Grand Central Station, that the Frisco R. R. also paid the Illinois Central Railroad Company 2 12ths of the regular three crossing flagmen's rate of pay, and 2 12ths of the electricity furnished for operation of color signals (R. 121-128). Haney was one of the three crossing flagmen mentioned, who were also known as switch tenders, working at the crossing referred to (R. 126).

It was admitted that Frisco passenger train #106 which arrived at Grand Central Station at Memphis, Tennessee on the evening of December 21, 1939 commenced its run at Birmingham, Alabama and was an inter-state train (R. 13).

The evidence showed that Lyman Elmer Haney, the deceased, while working as a switch-tender for Trustees defendants, and the Illinois Central Railroad, was injured and killed on December 21, 1939 in the switchyards at Memphis, Tennessee near the Grand Central Station by inter-state Frisco passenger train #106 of the trustees of the St. Louis-San Francisco Railway Company on its regular run from Birmingham, Alabama, to Memphis, Tennessee.

Haney, the deceased, in the performance of his duties as switch-tender, opened a switch to permit the Frisco passenger train to back into Grand Central Station (R. 218). Haney's duties required him to stand at or near the switch which he had opened until this Frisco train had backed in over the switch, after which Haney was required to immediately close the switch and return to his shanty nearby